MT LEGISLATIVE HISTORY

Chapter 284 1974

Bill H _____ S 715 Original bill & hist. ___C

H. Committee on Judiciary

Hearing Date(s) Feb 21 ✓C

Mar 05 ✓ Feb 26 ✓C

Mar 02 ✓C

Mar 04 ✓C

Date Out Mar 05 ✓C

S. Committee on Judiciary

Hearing Date(s) Feb 06 ✓C

Feb 12 ✓C

_____ ___C

_____ ___C

Feb 12 ✓C

BEST COPY AVAILABLE

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE SENATE

February 6, 1974

The meeting was called to order by Senator McKeon, chairman, at 11:00 a.m. in Room 405 of the Capitol Building.

The following bills were heard: SB 597, SB 598, SB 646, SB 715, SB 716, SB 717, HB 763

SB 597--Witnesses appearing on the bill:

SB 598 Senator Archie Cochran, District 8, sponsor
John Frankino, Montana Catholic Conference

Senator Cochran said his bills were submitted to protect the right ofany person of refusal relating to abortion and sterilization. He called these his "conscience" bills. Mr. Frankino supported the bills.

Senator Turnage questioned the felony clause of the bill.

SB 646--Senator Moore, sponsor, said he would hold action on his bill in lieu of the other abortion bills.

SB 715--Witnesses appearing on the bill:
SB 716
SB 717
Dr. Bill Norman, Representative
John Wilson, director Health Department
John Frankino, Montana Catholic Conference
Mrs. Shelton Williams, Missoula
Sally Lind, Mala Chap, Right-to-Life Organization
Bridget Whaley, Missoula
Lee George, self
Sandra Regnerus, Gallatin Valley Christian Political Action
Dr. Steve Lindstrom, director,
Bob Campbell, attorney, Member of ACLU
Lynn Carter, Missoula,

Senator McNamer, sponsor, said Dr. Norman would be available during the meeting to answer any medical questions. He submitted a statement (Attach. 1) stating his reasons for the bill and a suggested revised bill. He is opposed to any abortion acts except to preserve the life of the mother. The bill provides a "conscience" clause, the right to be fully informed, and the requirement of full reporting on abortions. Senator McNamer discussed all the revisions made on his bill. The "conscience" clause separates the rights of public and private hospitals, and individuals in their right of refusal. SB 716 and SB 717 were submitted as back-up bills to SB 715.

Mr. Wilson said that the Hospital Association supported the bill. Senator McNamer said the Nurses Association and the Montana Medical Association also supported it.

Mr. Frankino said their reasons for the support of the measure is to establish and protect human life. The difference between an abortion and natural birth is that in one the mother doesn't want the child. (Attach. 2)

Mrs. Regnerus wants to see the Constitution amended. Mrs. Williams said she wanted to see the following amendments made to SB 715: 1) Violation of the act be considered as a felony rather than a misdemeanor; 2) the use of some kind of aesthesia in killing of the fetus; 3) provision to prohibit a mother from aborting herself; or prohibiting a person from pretending to cause an abortion on a woman who is not pregnant, and prohibiting the sale of any abortifacients to any person other than a licensed physician or druggist. (Attch. 3) Dr. Linstrom was unclear about the "humane" disposition in Section 5, subsection 4.

Mr. Campbell spoke in a neutral tone, and testified just to bring some facts to mind. He said the decision should bee left up to the doctor and the mother and father, and that restriction of abortion during the first three months is not going to help. The idea of this was to avoid a later stage of abortion, Mr. Campbell questioned the measure relating to common law marriages, and on when viability occurs. Abortion laws were enacted to protect the mother from nonmedical standards, not to protect the fetus. He favored recording of all data, the division of standards for private and public hospitals, but questioned the right of a public hospital to refuse use of facilities. He also favors the "conscience" clause. Mr. Campbell said no one is forcing anyone to have an abortion, but in essence, a compulsory pregnancy is being forced on that person. This problem should not be based on emotions.

Senator McNamer said, inevitably, there is going to be some litigation concerning consent restrictions. He would amend the section defining "homicide" to comply with the present abortion laws, and that the interest lies in protecting the life and health of the mother and the fetus. He said that the terminology "viability or 6 months" could be used used to determine life.

Mrs. Regerus said that the mother should not be able to override the father's decision.

Senator Harrison questioned at who's expense the pathology tests were given. Also, how does a doctor determine when viability occurs. He said this would be putting a doctor in a position of committing a felony.

Senator Gilfeather questioned if there was a provision at the county level for the care of the living fetus. Senator McNamer said this would handled under the law for the "negligent child". He does'nt know if additional funds would be needed.

A subcommittee will be announced at a later date.

ROLL CALL

SENATE JUDICIARY COMMITTEE

SECOND HALF - 43rd LEGISLATIVE SESSION 1974 Dat: 2/6

NAME	PRESENT	ABSENT	EXCUSED
Luke McKeon	✓		
Pat Gilfeather	✓		
Paul Boyland	✓		
Mrs. Boots Hall	✓		
Miles Romney	✓		
Glenn Drake			
Tom Harrison	✓		
Jim Moore			
Jean Turnage	✓		

Each day attach to minutes

DATE FEBRUARY 6, 1974

COMMITTEE ON JUDICIARY SENATE BILL NOS. 597, 598, 646, 715, 716, 716

VISITOR'S REGISTER

NAME	REPRESENTING	BILL NO	Check One Support	Check One Oppose
Bob Campbell	ACLU of Montana			
Richard L. Fisher	Mont. Hospital Assn.			
Janice McDonnell				
Bridget Whaley	Montana Chap. Right to Life	715, 716, 717	X	
Theresa George	" " " "	715, 716, 717		
Lynn Carter	"	716, 716, 717	X	
Sarah A. Linde	"	715, 716, 717	X	
Claire Kenner	Montana Nurses' Assn.	715, 716, 717	X	
Margaret Kuntz	Montana Nurses' Assn.			
Dolph R. George	Montana Nurses' Assn.	716-717	X	
Donna Williams	Montana Right to Life	715, 716	X	
Steve Knight				

(Please leave prepared statement with Secretary)

COMMITTEE ON _____ BILL NO. S.B. 715

S.B. 716

VISITOR'S REGISTER

NAME	REPRESENTING	Check One: Support	Oppose
Dawn Williams	Mont. Chapter Right to Life	X	
Bridget Whaley	Mont. Chapter Right to Life Dir.	X	
[illegible]	Mont. Chap. Right to Life Dir.	X	
[illegible]	Mont. Chap. Right to Life Dir.	X	
[illegible]	Mont. Chap. Right to Life Dir.	X	
Ralph George	Montana Nurses Assn	X	
Nancy J. Vasey	Gallatin Valley Christian Retirement Center	X	
[illegible]	" " "	X	
Sandra Bigelow	Gallatin Valley Comm for Christ Action	X	
[illegible]	Bozeman Co. Dir. Young Women's Christian Assn		
[illegible]			
[illegible]	C.W.C.P. Montana Chairman		
[illegible]	Vista		
[illegible]	Vista CHP		
[illegible]			
[illegible]			
[illegible]	Vista CHP		
[illegible]	Manhattan Gallatin Valley Christian	X	
[illegible]	Mont		
[illegible]	Mont	X	
[illegible]	CHP Vista		
[illegible]			
[illegible]	[illegible] Dept		
[illegible]	Health Dept		
[illegible]	DHES		
[illegible]	Health Dept		
[illegible]	KMTV News		

Please leave prepared statement with Secretary.

COMMITTEE ON _____ BILL NO. _____

VISITOR'S REGISTER

NAME	REPRESENTING	Check One: Support	Oppose
[illegible]	Mont Stock Assn	✓	
John Bankins	Mont. Cath. Conf.		
[illegible]	[illegible]		

(Please leave prepared statement with Secretary)

NAME: John FRANKINO DATE:

ADDRESS: Box 404 Helena

PHONE:

REPRESENTING WHOM? Montana Catholic Conference

APPEARING ON WHICH PROPOSAL: SB 597-B, 646, 715-16-17

DO YOU: SUPPORT? AMEND? OPPOSE?

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Name Miss Shultzie Williams Bill No. 715, 716

Address Rt. 6, W. Rattlesnake, Mela. Date

Whom do you represent?

Amend? yes X Oppose? Support? yes X

Please leave prepared statement with secretary.

Name Roland K. Fisher Bill No. SB 577

Address Helena Date 2/6/76

Whom do you represent? Mont. Hosp. Assn.

Amend?_____ Oppose?_____ Support? X

Please leave prepared statement with secretary.

Name Ronald K. Foster Bill No. SB 598

Address Helena Date 2/6/74

Whom do you represent? Montana Hospital Assoc.

Amend?_____ Oppose?_____ Support? ✓

Please leave prepared statement with secretary.

Name Roland K. Fisher Bill No. SB 646

Address Helena Date 2/6/85

Whom do you represent? Montana Highway Patrol Assoc.

Amend? ✓ Oppose? _____ Support? _____

Please leave prepared statement with secretary.

Amend out the words "or employment safety" on lines 15 + 16 page 2.

Name Russell S. Fisher Bill No. SB 715

Address Helena Date 2/6/24

Whom do you represent? Montana Hospital Assn.

Amend? ✓ Oppose?_____ Support?_____

Please leave prepared statement with secretary.

Amend out the words
~~of employment~~ practices of"
on lines 8 & 9 page 8.

Name Robert Pinkerton Bill No. SB 716

Address Helena Date 2/6/74

Whom do you represent? Montana Hospital Assoc.

Amend? Yes Oppose? _____ Support? _____

Please leave prepared statement with secretary.

Amend out the words

"Employment practices or"

on line 4 of page 2

SB

Name Robert K. Fisher Bill No. 717

Address Helena, Mont. Date 2/6/74

Whom do you represent? Montana Hospital Assn.

Amend? X Oppose?_____ Support?_____

Please leave prepared statement with secretary.

Amend out the words "employment practices or" on lines 5-6 of page 2

A 1

MONTANA ABORTION CONTROL ACT

I am personally opposed to all abortion except where necessary to preserve the life of the mother.

I believe the United States Supreme Court not only was wrong, but acted beyond its constitutional powers. I favor a constitutional amendment to reverse their decision.

However, in the meantime, maximum control of abortion must be maintained by the state. I believe this bill will do that, and at the same time satisfy those members of the legislature who believe the Supreme Court decision must be recognized. I, therefore, hope this bill will produce the agreement necessary for the 43rd Legislature to get some control over the situation.

The bill frankly aims at reaffirming the tradition of Montana law to protect human life, and restricts abortion to the fullest extent permissible under the Supreme Court decision.

It requires the physician to fully inform the mother of the effects of, and alternatives to, her decision. It requires the consent of her spouse, or if an unmarried minor, a parent.

Abortion in the late stages of pregnancy is prohibited unless necessary to preserve the life or health of the mother. The life of the child aborted alive is fully protected by law.

The bill requires full reporting on abortions, subject to the ex-mother's right of privacy as to disclosure of her name. It prohibits advertising for abortion.

The bill fully protects the right of any individual or hospital to refuse to participate in an abortion.

Sen. M. Hanna

Section 1. Short title. This act shall be known and may be cited as the "Montana Abortion Control Act".

Section 2. Statement of purpose. The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.

Section 3. Definitions. As used in this act:

(1) "Department" means the department of health and environmental sciences.

(2) "Facility" means a hospital, health care facility, physician's office or other place in which an abortion is performed.

(3) "Informed consent" means voluntary consent to abortion by the woman upon whom the abortion is to be performed only after full disclosure to her by the physician who is to perform the abortion of such of the following information as is reasonably chargeable to the knowledge of such physician in his professional capacity:

(a) The stage of development of the fetus, the method of abortion to be utilized, and the effects of such abortion method upon the fetus.

(b) The physical and psychological effects of abortion.

(c) Available alternatives to abortion, including childbirth and adoption.

Such informed consent shall be evidenced by a written statement in the form prescribed by the department signed by the physician and the woman upon whom the abortion is to be performed in which the physician certifies that he has made the full disclosure provided above and in which the woman upon whom the abortion is to be performed acknowledges that the above disclosures have been made to her and that she voluntarily consents to the abortion.

(4) "Abortion" means the performance of, or assistance or participation in the performance of, or submission to, an act or operation intended to terminate a pregnancy without live birth.

(5) "Viability" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.

Section 4. Consent to abortion. (1) No abortion may be performed upon any woman in the absence of informed consent.

(2) No abortion may be performed upon any woman in the absence of the written consent of

(a) her husband, unless her husband is voluntarily separated from her;

(b) a parent, if living, or the custodian or legal guardian of such woman, if she is under eighteen (18) years of age and unmarried.

(3) The above informed consent or consent is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(4) No court, judge, executive officer, administrative agency or public employee of the state of Montana or of any local governmental body has power to issue any order requiring an abortion or shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.

(5) Violation of subsections (1) and (4) of this section is a felony. Violation of subsection (2) of this section is a misdemeanor.

(6) The use of the prescribed departmental form of informed consent required by section 4 (3) shall not be mandatory until July 1, 1974. Prior thereto, a written statement fairly setting forth the content specified by section 3 (1) shall be in compliance therewith.

Section 5. Protection of life and health of infant. (1) A person commits the offense of criminal homicide, as defined in sections 94-5-101 through 94-5-105, if he purposely, knowingly, or negligently causes the death of a premature infant or fetus aborted alive, if such infant or fetus is viable.

(2) Whenever a premature infant or fetus is aborted alive and is viable, it becomes a dependent and neglected child subject to the provisions of state law, unless:

(a) the termination of the pregnancy is necessary to preserve the life of the mother; or

(b) the mother and her spouse, or either of them, have agreed in writing in advance of the abortion, or within seventy-two (72) hours thereafter, to accept the parental rights and responsibilities of the premature infant or fetus if it survives the abortion procedure.

(3) No person may use any premature infant or fetus aborted alive for any type of scientific research, or other kind of experimentation except as necessary to protect or preserve the life and health of such premature infant or fetus aborted alive.

(4) The department shall make regulations to provide for the humane disposition of dead infants or fetuses.

(5) Violation of subsection (3) of this section is a felony. Violation of subsection (4) of this section is a misdemeanor.

Section 6. Control of practice of abortion. (1) No abortion may be performed within the state of Montana:

(a) Except by a licensed physician.

(b) After the first three months of pregnancy, except in a hospital licensed by the department.

(c) After viability of the fetus, unless:

(i) in appropriate medical judgment, the abortion is necessary to preserve the life or health of the mother, provided however that the timing and procedure used in inducing the abortion are such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in section 94-2-101 (32), consistent with the preservation of the life or health of the mother; and

(ii) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by him, setting forth in detail the facts upon which he relies in making such judgment; and

(iii) two other licensed physicians have first examined the patient and concurred in writing with such judgment.

The foregoing certification and concurrence is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(2) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(3) Violation of subsection (1) of this section is a felony. Violation of subsection (2) of this section is a misdemeanor.

Section 7. Reporting of practice of abortion. (1) Every facility in which an abortion is performed within the state of Montana shall keep on file upon a form prescribed by the department a statement dated and certified by the physician who performed the abortion setting forth such information with respect to the abortion as the department by regulation shall require, including, but not limited to, information on prior pregnancies; the medical procedure employed to administer the abortion; the gestational age of the fetus; the vital signs of the fetus after abortion, if any; and if after viability, the medical procedures employed to protect and preserve the life and health of the fetus.

(2) The physician performing an abortion shall cause such pathology studies to be made in connection therewith as the department shall require by regulation, and the facility shall keep the reports thereof on file.

(3) In connection with an abortion, the facility shall keep on file the original of each of the documents required by this act relating to informed consent, consent to abortion, certification of necessity of abortion to preserve the life or health of the mother, and certification of necessity of abortion to preserve the life of the mother.

(4) Such facility shall within thirty (30) days after the abortion file with the department a report upon a form prescribed by the department and certified by the custodian of the records or physician in charge of such facility setting forth all of the information required in subsections (1), (2), and (3) of this section, except such information as would identify any individual involved with the abortion. The report shall exclude copies of any documents required to be filed by subsection (3) of this section, but shall certify that such documents were duly executed and are on file.

(5) All reports and documents required by this act shall be treated with the confidentiality afforded to medical records, subject to such disclosure as is permitted by law; except that statistical data not identifying any individual involved in an abortion shall be made public by the department annually, and the report required by subsection (4) of this section to be filed with the department shall be available for public inspection except insofar as it identifies any individual involved in an abortion.

(6) The department shall report to the attorney general any apparent violation of this act, and the attorney general shall periodically make random review of the records of the department to discover any such violation.

(7) Violation of this section is a misdemeanor.

(8) The reports required by this section shall not be mandatory for any abortion performed prior to July 1, 1974.

Section 8. Refusal to participate in abortion. (1) No public hospital or health care facility shall be required contrary to the stated religious beliefs or moral convictions of such hospital or facility to admit any person for the purpose of abortion or to permit the use of its facilities for such purpose. Such refusal shall not give rise to liability of such hospital or health care facility, or any personnel or agent or governing board thereof, to any person for damages allegedly arising from such refusal, nor be the basis for any discriminatory, disciplinary, or other recriminatory action against such hospital or health care facility, or any personnel, agent, or governing board thereof.

(2) No private hospital or health care facility shall be required contrary to the religious or moral tenets or the stated religious beliefs or moral convictions of such hospital or facility to admit any person for the purpose of abortion or to permit the use of its facilities for such purpose. Such refusal shall not give rise to liability of such hospital or health care facility, or any personnel or agent or governing board thereof, to any person for damages allegedly arising from such refusal, nor be the basis for any discriminatory, disciplinary, or other recriminatory action against such hospital or health care facility, or any personnel, agent, or governing board thereof.

(3) All persons shall have the right to refuse to advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions. If requested by any hospital or health care facility, or person desiring an abortion, such refusal shall be in writing signed by the person refusing, but may refer generally to the grounds of "religious beliefs and moral convictions". The refusal of any person to advise concerning, perform, assist, or participate in abortion, shall not be a consideration in respect of staff privileges of any hospital or health care facility, nor a basis for any discriminatory, disciplinary, or other recriminatory action against such person, nor shall such person be liable to any person for damages allegedly arising from refusal.

(4) Any person who knowingly interferes or attempts to interfere with the right of refusal authorized by this section, whether by duress, coercion, or any other means, shall be guilty of a misdemeanor. The person injured thereby shall be entitled to injunctive relief, when appropriate, and shall further be entitled to monetary damages for injuries suffered.

(5) Such refusal by any hospital or health care facility or person shall not be grounds for loss of any privileges or immunities to which the granting of consent may otherwise be a condition precedent, or for the loss of any public benefits.

(6) As used in this section, the term "person" includes one or more individuals, partnerships, associatons, and corporations.

Section 9. Other regulations. The department shall make regulations for a comprehensive system of reporting of maternal deaths and complications within the state of Montana resulting directly or indirectly from abortion, subject to the provisions of section 7 (5) of this act.

Section 10. Penalties. (1) A person convicted of criminal homicide under this act is subject to the penalties prescribed by sections 94-5-101 through 94-5-105.

(2) A person convicted of a felony other than criminal homicide under this act is subject to a fine not to exceed one thousand dollars ($1,000), or imprisonment in the state prison for a term not to exceed five (5) years, or both.

(3) A person convicted of a misdemeanor under this act is subject to a fine not to exceed five hundred dollars ($500), or imprisonment in the county jail for a term not to exceed six (6) months, or both.

Section 11. Effect of miscarriage provisions. It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation. Sections 94-5-611 and 94-5-612 are retained in force, as modified by this act and as limited by the rulings of courts and paramount law.

Section 12. Section 10-501, R.C.M. 1947, is amended to read as follows:

"Dependent and neglected children--definition. For the purpose of this act, the words 'dependent child' or 'neglected child' shall mean any child of the age of seventeen (17) years, or under that age, including a premature infant or fetus which is the subject of abortion as that term is defined in the Montana Abortion Control Act if such infant or fetus is aborted alive and has the ability to live outside the mother's womb albeit with artificial aid, who is dependent upon the public for support, and who is destitute, homeless, or dependent, or who has no proper parental care or guardianship, or who habitually begs or receives alms, or who is found living in any house of ill-fame, or in any house of prostitution, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child, or whose environment is such as to warrant the state, in the interest of the child, to assume its guardianship or support."

Section 13. Section 94-2-101 (22), R.C.M. 1947, is amended to read as follows:

"'Human being' means a person who has been born and is alive, including a premature infant or fetus born or aborted alive, if such infant or fetus has the ability to live outside the mother's womb, albeit with artificial aid."

Section 14. Severability. It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all the valid applications that are severable from the invalid applications.

Section 15. This act is effective on its passage and approval.

ATTCH. 23

Tel. (406) 443-2028

MONTANA CATHOLIC CONFERENCE

P. O. BOX 404 830 N. EWING
HELENA, MONTANA 59601

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February 4, 1974

TO: The Honorable John L. McKeon, Chairman
Senate Judiciary Committee

RE: Abortion Legislation

The present situation is that:

1. there is no prohibition of abortion in Montana. The decisions of the United States Supreme Court, as applied through the District Court action in Montana, voided existing prohibitions in Montana law. On January 22, 1973 the United States Supreme Court issued two rulings affecting abortion laws in this country. The majority opinion held that a woman's right to privacy includes the right to determine with her physician whether to have an abortion. This right of privacy may be interfered with only for reasons of safeguarding her own health and her own life; or when her child becomes viable, her right of privacy may be restricted by corresponding protection for the right of her child to live;

2. there are proposals before the state legislature to provide the fullest protection possible against abortion under the limits established in the Supreme Court decisions.

3. the Catholic Church--and the Montana Catholic Conference--has taken a public stand against abortion. Faced with de facto legalization of abortion, this stand has not changed; we are still opposed to abortion.

Given the present situation, the Montana Catholic Conference:

A) endorses and encourages efforts to obtain a constitutional amendment which will enable effective protection for all human life, and,

B) encourages the efforts of the Montana legislators to provide, in the interim, the fullest protection possible for all human life, by establishing in law as many protections and restrictions as are legally available concerning the performance of abortions.

In evaluating various proposals to safeguard human life by restricting the practice of abortion, we consider various principles to be helpful in clarifying the options available to a legislator.

A. It is in the best interest of the State of Montana to protect the life, dignity and health of its citizens. Much of our present legislation is based on this premise. It makes sense: without it, the basis for the state crumbles.

B. The life, health and dignity of the mother must be safeguarded.

For years, abortion legislation has attempted to achieve this through outlawing abortion mills and unsafe practices. This is one of the considerations which may still override the mother's right to privacy, according to the Supreme Court.

This concern for the mother's life, health and dignity may be safeguarded in various ways by law. Some examples include: assuring adequate medical attention and psychological assistance; assuring she is adequately informed of what an abortion entails, its possible effects on her personally, and the alternatives available to her; protection against unscrupulous schemes or even governmental pressure; etc.

C. The life, health and dignity of her child must also be safeguarded, to the extent possible.

This concern forms the basis for on-going medical research, the activities of major philanthropic organizations, and the practice of every obstetrician. This concern may only be expressed in a limited manner in the law, as a result of the Supreme Court's decision; but it can be expressed.

For example, when the child becomes viable everything can be done to protect his life: the procedures used, the time of the operation in relation to gestation, the care taken in performing the procedure, etc. If the only difference between abortion and premature birth in a given case is the fact the mother does not wish to keep the child, the state may intervene on behalf of the unborn but viable infant, and save his life.

D. There should also be the fullest consideration possible for the rights of all who have an interest in, or become involved in, the abortion.

Because of the special relationship in privacy between husband and wife, the rights of the husband may be safeguarded in law. The woman has no more absolute right to privacy than her husband.

Because of the special relationship in privacy between parents and child the rights of the parents of unmarried minors may be safeguarded in law.

Doctors, nurses and others called on to participate in abortion procedures, particularly those not necessary to save the life or health of the woman are being asked to participate in a procedure which is not essential, and which for many is objectionable on ethical or moral grounds. Objections in conscience should be safeguarded by law - for individuals, and for institutions which adopt such an ethical position.

We recognize abortion is not an easy issue to face. Montana's legislature must pass some law regulating abortion, or face the alternative of wide-open abortion with no protection for the woman, her child, or the rights of others. We urge that each proposal be evaluated in the light of the principles noted above, and every effort be made to protect the life, health and dignity of all Montanans.

Senate Judiciary Committee
Capital Building
Helena, Montana 59601

Re: Abortion Legislation

Gentlemen:

The undersigned strongly urge that you recommend passage of Senate Bill No. 715 and Senate Bill No. 716. We believe that Montana desperately needs the most restrictive abortion bill possible. During the past months when Montana has had no restrictions imposed upon abortions, the medical profession has been unable to regulate itself to reasonably restrict abortion procedures. It is our understanding that abortions are being performed in at least one hospital well into the third trimester of fetal life -- into the period in which the child would have a good chance of surviving a normal miscarriage.

We feel that Senate Bill No. 646 is a good bill, but not detailed enough in its handling in the many problems created for us by the United States Supreme Court in its Wayde and Bolton decisions.

In supporting Senate Bill 715, we acknowledge that there are areas not covered by the Bill and areas in which the Bill could be strengthened to better protect human life within the perimiters of the Supreme Court rulings. The bill should be amended in the following respects:

1. Because of the seriousness of the subject being regulated herein, we feel that a violation of the act should be a felony rather than a misdemeanor, and the punishment for violation should be a minimum of one year in prison.

2. The human fetus, whether or not given constitutional protection as a "person" by the Supreme Court does represent human life which is entitled to all of the respect and consideration which can be accorded to it. It is an established fact that from at least the eighth week the fetus is sensitive to touch and feels and reacts to pain. See authorities cited in the attached article, "The Merchants of Calumny", Linacre Quarterly, November, 1973, 272-274. Because of the fact

of fetal pain, we feel that the act should direct the Board of Health and Environmental Sciences to determine and proscribe the more inhumane types of abortion procedures which involve poisoning and burning the baby to death with saline solution and cutting the baby into pieces with a knife or suction. We further urge that the Board of Health and Environmental Sciences be directed to require that the child be placed under anesthesia when it is killed to reduce needless suffering.

3. If further amendment is possible, we would suggest that certain of the provisions from the Model Penal Code, section 230.3, dealing with abortion, be adopted. This code was considered by the Supreme Court in the Bolton case, and these portions were not specifically ruled as being unconstitutional:

(a) A provision prohibiting a woman from aborting herself.

(b) A provision prohibiting a person from pretending to cause an abortion on a woman who is not pregnant.

(c) A provision prohibiting the sale or distribution of abortifacients to anyone other than a licensed physician or druggist, except upon prescription of a physician in accord with the provisions of the act.

In addition to passing Senate Bill 71, because of the urgency of the need to provide maximum possible protection to the thousands of unborn human beings facing slaughter in Montana under the Supreme Court decisions and the confusion as to how far the Legislature can go in providing such protection, we urge that an Interim Committee be set up by the Legislature to study this matter and to advise the next Session of the Legislature on the following matters:

1. What are the least inhumane methods of abortion and what can be done to reduce the pain suffered by the fetus while it is being killed?

2. Inasmuch as the Supreme Court decision in the Roe case ties its rationale around the problems of pregnancy

of the mother such as "a distressful life and future", "phychological harm", "mental and physical health", "the unwanted child", and "stigma of unwed motherhood", it seems that there may be ways involving state action to mitigate or remove these arguments for abortion. These might include state supplied or coordinated assistance for "unwilling" mothers, such as medical and obstetrical care, a place to reside and employment during pregnancy, legal and psychological counseling, and ultimately adoption. It seems that if these drawbacks were reduced by state action in Montana, the Supreme Court might tolerate a more restrictive abortion law in Montana.

3. Recommendations for appropriate legislation to protect human life at all additional stages.

Thank you for your consideration.

Yours truly,

Donna F. Williams
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The Merchants of Calumny

Donald DeMarco, Ph.D.

In all of English literature, perhaps the most dramatic and devastating argument against prejudice is that given by Shylock in *The Merchant of Venice*:

> I am a Jew. Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? if you tickle us, do we not laugh? if you poison us, do we not die? and if you wrong us, shall we not revenge? if we are like you in the rest, we will resemble you in that.

There can be no retort to Shylock's statement. One must either recognize the facts presented and agree that Shylock is both human and deserving of equal treatment with Christians, or ignore the facts and walk away. The reason for this is that the Jew's self-defense is mounted on too fundamental a level to be undercut. He wisely avoids sophisticated reasons, academic distinctions and intellectual subtleties that could render his argument suspect, weak or unclear. His self-defense is really a self-description and in describing the elementary fact he makes his case irrefutable and undefeatable.

Taking the fundamental and forthright approach of Shylock, can a convincing argument be raised in defense of the humanity of the human fetus and his right to equal protection with adults? Substituting 'human fetus' for 'Jew' and 'adult' for 'Christian,' the same argument used by Shylock is set forth in defense of the human unborn against his detractors — the merchants of calumny.

I. I am a human fetus.

In his article on "The Humanity of the Unborn Child," pediatrician

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Dr. DeMarco is Assistant Professor of Philosophy at St. Jerome's College, University of Waterloo, Waterloo, Ontario. In his article he sets the abortion issue in a literary context and draws on Shakespeare's The Merchant of Venice.

Lupeng Diamond writes:

> To consider the fetus not to be a separate person but merely a part of the mother has not been tenable since the seventeenth century when Aranthius showed that the maternal and fetal circulations were separate — neither continuous nor contiguous.[7]

Contrary to the unscientific thinking of Justice Holmes who once declared that the unborn child is "a part of its mother,"[8] medical evidence[9] shows conclusively that the fetus is a distinct human being in its own right "with its separate principle of growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and heart and vital organs."

Genetics clearly establishes the human fetus as a member of the human race by recognizing the genesis of his 23 pairs of chromosomes per somatic cell as being derived equally from a human mother and a human father. Fetology establishes the selfhood of the human fetus by tracing the growth and development of the fetus from a single cell which neither belongs exclusively to the mother or father. Dr. H. M. I. Liley writes:

> He (the unborn baby) has his own space (cupule, the amniotic sac). He has his own lifeline, the umbilical cord and he has his own food system, the placenta. These all belong to the baby himself, not to his mother. They are all developed from his original cell.[10]

The selfhood of the human fetus is further corroborated by electrocardiographic (ECG) readings of his heart beat at 21 2 weeks[11] and electroencephalographic recordings of his brain waves at 43 to 45 days[12] (EEG).

2. . . . Hath not a human fetus eyes?

His eyes begin to form at 19 days. By 8-1/2 weeks the eyelids become sensitive to touch. If the eyelid is stroked, the child will squint.[13] Rugh and Shettles describe the fetus after 8 weeks as having "a human face with eyelids half closed as they are in someone who is about to fall asleep."[14] During the fifth month hair begins to grow on his eyebrows and a fringe of eyelashes appears.

In the sixth month his eyelids will open and close. His eyes will look up, down and sideways. The iris diaphragm will contract or dilate to admit the proper light intensity. Dr. Albert Liley, one of the world's most renowned fetologists, contends that the child may perceive light through the abdominal wall of his mother.[15]

3. . . . hath not a human fetus hands, organs, dimensions, senses, affections, passions?

The hands with fingers and thumbs are recognizable by the seventh week of fetal life.[16] The lines in the hands (and feet), which will remain a distinctive feature throughout the life of the individual, are engraved at 8 weeks.[17] At 8 1/2 weeks the palms of the hands become sensitive to touch. If the palm of the fetus is touched, the fingers will close to a small fist.[18] The child's grip at 16 weeks is quite strong. At this time he is able to maintain his grasp on an object

such as a slender rod, while that object is being moved up and down or slightly away from him.[16]

All the organ systems are present in the human fetus by eight weeks.[16] In the ninth and tenth weeks, if the child's forehead is touched, he may turn his head away from the stimulus and pucker up his brow and frown. By the twelfth week, his organs, dimensions, senses, affections and passions are present and operative.

By the end of the first trimester (twelfth week) the fetus is a sentient moving being. We need not pause to speculate as to the nature of his psychic attributes, but we may assume that the organization of psychosomatic self is now well underway.[17]

4. . . . fed with the same food?

In Shakespearian England, as scholars have pointed out, the segregated Jew did not dine in the company of the Christian. Moreover, in accordance with his Jewish tradition, his diet was markedly different from that of the Christian. The human fetus and his mother, on the other hand, are quite literally fed with the same food.

The taste buds, salivary and digestive glands develop in the fetus during the third month. At this time the baby is able to swallow and utilize amniotic fluid.[18] Although the blood of the mother and her child do not mix during fetal development, the child receives oxygen and food from his mother through placental attachment, "much like he receives food from her after he is born."[19]

When a child *in utero* fails to receive adequate nourishment, it is possible to correct this problem by injecting supplementary nutrients directly into the amniotic fluid which he normally swallows (250 to 700 cc. a day). In the words of one doctor, "We well may be able to offer the child that is starving because of a placental defect a nipple to use before birth."[20]

5. . . . hurt with the same weapons?

In a recent interview, a California doctor who performed abortions was asked the following question: "Doctor, what does the aborted baby feel while it's dying?" The doctor answered, "Oh, I think that depends on your philosophy." Furthermore, he stated that the question was not an important one.[21]

To Dr. Albert W. Liley of New Zealand, the question of fetal pain can be answered on the basis of objective evidence and is a crucially important one. In 1963 Dr. Liley developed the first surgical technique for administering blood transfusions to the fetus within the womb.[22] According to Dr. Liley, the fetus feels pain as early as three months. In offering instructions for carrying out the surgical techniques of fetal blood transfusions, he advises his colleagues to take into serious consideration this fact of fetal pain. During the actual surgical procedure, the child must be sedated and given pain relieving medication. Dr. H. M. I. Liley, Dr. Liley's wife and research assistant and a distinguished fetologist and pediatrician in her own right,

> When doctors first began invading the sanctuary of the womb, they did not know that the unborn baby would react to pain in the same fashion as a child would. But they soon learned that he would. By no means a "vegetable," as he has so often been pictured, the unborn knows perfectly well when he has been hurt, and he will protest it just as vociferously as would a baby lying in a crib.[22]

In reference to aborting a 12 week old fetus by the method of dilatation and curettage (D&C) where the neck of the womb is opened to allow the removal of the fetus in pieces, by the scraping of a sharp instrument called a curette, Dr. Diamond states, "When this procedure is done, there is little doubt that the fetus, in fact, feels what is done to it."[23]

In the words of physician Gino Papola, "The curette will become mightier than the sword."[24]

The weaponry used against the unborn — curette, suction and salt, together with the methods of starvation and suffocation which follow a hysterectomy abortion, are fatal for the unborn for physiological reasons alone. Being assaulted by these weapons and methods, the adult would succumb for the same medical reasons the aborted fetus does.

6. . . . subject to the same diseases?

Dr. H. M. I. Daley writes, "No problem in fetal health or disease can any longer be considered in isolation. At the very least, two

The most convenient way in which the physician may diagnose the condition of the fetus is from an analysis of the amniotic fluid which surrounds the unborn child. In observing the color, turbidity and volume of the amniotic fluid, or the enzymes and other chemicals contained therein, he is able to diagnose a long list of fetal diseases.[27] In addition, the electrocardiogram of the unborn and the analysis of his heart sounds through phonocardiography is helpful to the diagnostician.

In Ashley Montagu's book, *Life before Birth*, the author lists some of the diseases which may afflict the unborn child. The list includes pneumonia, scarlet fever, typhoid, streptococcal infections, rheumatic fever, listeriosis, syphilis, malaria, virus diseases, tuberculosis, viral hepatitis, and others. All these diseases can be transmitted from the pregnant mother to her unborn child.[28]

7. . . . healed by the same means?

Dr. Daley's technique of intrauterine blood transfusion has been mentioned. Perhaps the most famous case involving a blood transfusion given to the unborn fetus occurred in 1964. Because of certain religious beliefs, a pregnant woman refused to allow her unborn to undergo a blood transfusion. The child, because of an Rh problem in his blood, vitally needed this particular operation. The case went to court. The judge ruled that the unborn's right to survival was a value which outweighed the mother's right to prac-

tice her religious beliefs in this manner.[30]

Analysis of the amniotic fluid surrounding the unborn has led to diagnoses of the adrenogenital syndrome, hemolytic anemia, adrenal insufficiency, congenital hyperammonemia and glycogen storage disease. Some of these and, hopefully in the future, all of these maladies can be treated before birth.[31]

Apart from medical means there are ways in which nature heals the injured fetus. If the child sustains a fractured limb where his mother suffered a fall, the limb would heal naturally. Even a gunshot wound incurred at three months would heal naturally and by the time of his birth, only a scar would remain.[32]

8. . . . warmed and cooled by the same winter and summer as an adult is?

Through temperatures both high and low as well as changes in temperature, the unborn is directly affected.[33]

When the body is colder than normal, metabolism is retarded and oxygen is circulated in the blood stream at a slower rate. This means that when the body is cooled, the brain needs less oxygen than normal. When a patient faces a lengthy operation in which he is to receive heavy amounts of anesthesia, it is sometimes medically expedient to cool the body so as to combat the harmful effects to the brain represented by larges doses of anesthesia.

Drs. F. Wilson and C. B. Sedzimir have reported a case where a woman 32 weeks pregnant had been cooled in preparation for surgery. As her body temperature was being reduced, the heartbeat of her unborn child dropped from 160 to 85 beats per minute. Furthermore, when trimethaphan was injected into the woman, for the purpose of providing a relatively bloodless field for surgery, the fetus protested by kicking rather furiously. The doctors conjectured that the kicking was brought on by a state of induced anoxia (lack of oxygen) in the child caused by the drug injection. In another case, a patient's temperature was cooled to 86 degrees F. prior to her operation. At the same time, her 24 week unborn child's heart beat fell from 180 beats per minute to 120.[33] In both cases, after the mother's temperature returned to normal, the child's metabolic and circulatory rates returned to normal.

9. . . . If you prick us do we not bleed?

Blood cells begin to appear at about 17 days. The heart commences development at 18 days and although this figure is given as the normal time for such development, Marcel and Lachaquet attest to observing contractions of the heart as early as 2 weeks.[34]

At 30 days the heart is beating regularly 65 times a minute[35] and pumping blood cells through a closed circulatory system.[36] At 5 1/2 weeks the heart is functionally complete and is essentially similar to that of an adult in general configuration.[37]

By the seventh week of life, the liver manufactures red blood cells and the kidney is engaged in eliminating uric acid from the blood.[36] Strams et al. have shown that the electrocardiogram of a 7½ week fetus demonstrates the existence of a functionally complete cardiac system.[37]

The blood which the unborn sheds when aborted is his own, its type (antigens and antibodies) being determined genetically from the zygote cell at conception and not from either the mother's or father's blood type exclusively.

10. . . . If you tickle us do we not laugh?

Dr. Andre Hellegers writes: "If we tickle the baby's nose, he will flex his head backwards away from the stimulus."[38]

About the end of the twelfth week, the vocal cords of the unborn are completed. The child however is unable to cry for laughter primarily because his voice cannot be activated in the absence of air.[39]

Dr. Liley relates an incident where an air bubble had been injected into an eight month unborn baby's amniotic sac for the purpose of locating the placenta on x-ray. The air bubble happened to cover the child's face. When this occurred the child inhaled allowing his vocal cords to become operative and produced a cry which was clearly audible to all those present including the physician and the technical assistants. The mother later reported to the doctor that the air bubble kept moving over the baby's face whenever she lay down to sleep, allowing the child to cry so loudly that both she and her husband were kept awake.[40]

11. . . . If you poison us do we not die?

Dr. Willke described induced abortion by the method of saline poisoning in the following way:

> A large needle is inserted through the abdominal wall of the mother and into the baby's bag of water. A concentrated salt solution is injected into his amniotic fluid. This immediately poisons the baby, causing him to convulse and die. About a day later the mother goes into labor and delivers a dead baby.[41]

There is enough scientific evidence reported to justify the claim that the unborn child is as susceptible to poisoning as the rest of the population.[42] Lead, mercury, arsenic, copper, phosphorous, bromide, iodide, potassium chlorate and strontium are just a few of the many inorganic poisons which can reach the child through his mother's body.[43]

Dr. P. Bernhard in 1949, Dr. J. M. O'Lane in 1953 and Dr. J. R. Zabriskie in the same year found, as a result of their extensive studies, a strong index of correlation between pregnant women smokers and abnormally high rates of spontaneous abortion and prematurity[44] (prematurity is the number one cause of death in early infancy).[45]

12. . . . and if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that.

It is written in the Talmud that "Whoso sheds the blood of man

within man, his blood shall be shed."[48]

Professor Ian Donald of Glasgow University, in reporting on 20,000 legal abortions in England in 1969 (which resulted in the deaths of 15 mothers) writes, "We can look forward to this (legal abortion) being the dominant cause of death in young women."[49]

The Royal College of Obstetrics and Gynecologists, in an inquiry into the effects of the first year of England's *Abortion Act (1967)* states:

> Eight maternal deaths occurred in relation to 27,000 terminations of pregnancy during the year 1968. This gives a mortality rate of 0.3 per thousand, which is higher than the maternal mortality rate (including abortions criminal or otherwise) for all pregnancies in England and Wales at the comparable time. A statement issued by the Secretary of State to Parliament on 1 February 1970 reveals a similar state of affairs in respect of about 54,000 induced abortions notified from all sources during 1969, among these there were 17 maternal deaths.[50]

In a documented report presented before the Minnesota State Legislature, legal abortion mortality rates were compared with the maternal mortality rates per births. The maternal mortality rate for the state of Minnesota was established by Rosenfield et al[51] at 14 per 100,000 live births. The deaths of women per 100,000 legal abortions in countries having a history of legal abortions showed Finland to have a rate of 66 per 100,000, Denmark 41.4, Sweden 19.2 and Great Britain 39.2.[52]

On the basis of the mortality rates for mothers undergoing abortions in various countries where abortion was practiced under legal auspices, the following conclusion was reported by the *American College of Obstetrics and Gynecology*:

> The inherent risks of a therapeutic abortion are serious and may be life threatening; this fact should be fully appreciated by both the medical profession and the public. In nations where abortion may be obtained on demand, a considerable morbidity and mortality have been reported.[53]

Apart from mortality figures, non-fatal medical complications arising from induced abortions have been documented and reported, indicating the grave risks to health and fertility a woman assumes in undergoing an abortion.

Dr. Stallworthy et al reported the results obtained on 1,182 legal abortions in one teaching hospital in England. The report showed that nearly 17% of the patients lost more than 500 ml. of blood and 9.5% required transfusion. In addition, cervical lacerations occurred in 4.2% and the uterus was perforated in 1.2%. Emergency laparotomy was required 6 times and hysterectomy was twice necessary to save life. In 2% of the patients pyrexia (high fever) of 38°C. or more persisted for longer than 24 hours. Fourteen patients suffered peritonitis.[54]

It is disquieting, wrote the doctors, that postabortal infection which is one of the common causes of death after criminal abortion should have occurred in 2% of this series.[54]

The Stallworthy report was especially disturbing since it showed almost identical results with those reported by Sood.[56]

Dr. Droegemuller, reporting on Colorado's first year experience with legal abortion, reported that 8 out of every 100 women required blood transfusions after being aborted.[57]

The incidence of major hemorrhaging following legal abortion was reported in Russia as 11.2%,[58] (D&C) Great Britain 21%,[59] (all methods of inducing abortion) Sweden 1 to 1.8% (saline).

Statistics

In Japan the 1969 survey of the office of the prime minister reported the following complications resulting from induced abortion: 9% sterility after three years, 14% habitual spontaneous abortion, 4% extra uterine pregnancies, 1% menstrual irregularities, 20% abdominal pains, 19% dizziness, 2% headache, 3% frigidity, 13% exhaustion, 3% neurosis.[61]

The Nagoya survey by the Women's Associations reported 59% were severely troubled with adverse after effects or were in poorer health following abortions. In the Mainichi survey in 1969, 18% complained of being physically unwell after one abortion, 27% after two, 40% after three, and 51% after 4.[62]

The Swedish experience with legal abortion is well documented. Perhaps the most thorough follow up study on women who have undergone abortions has been done by Dr. Martin Ekblad. Dr. Ekblad studied 479 women at the time of their abortion and again 2-3-1/2 years later. He found that 10% continued to feel the operation unpleasant; 14% had mild self-reproach; 11% suffered serious self-reproach and self-regret, and 1% had gross psychiatric breakdowns.[63]

A study in Poland has shown a 14% decrease in sexual libido 4 to 5 years after abortion,[64] while the Czechs have reported decrease in libido in 33% of patients 9 months after the abortion.[65]

It has been said that "You can drag a baby out of the uterus but you cannot wipe it out of the mind."[66] According to certain psychologists and psychiatrists the feminine principle is one of receiving, keeping and nourishing.[67] Although the pregnant woman may mentally deny her unborn child, once she admits she is pregnant (and she must do this to undergo an abortion) she feels an unconscious attachment to him. Because of this many women feel that part of themselves is lost through abortion.[68]

The psychiatrist Karl Stern states that it is not infrequent that women who have had abortions break down with a serious depression or even psychosis when the time arrives when they would have given birth to their child. What is remarkable about this notes Stern is that the patient may very well be unaware of when that due date was, or even indifferent to the moral dimension of abortion. Her profound reaction of loss coincides with the time of

birth which did not take place.[68]

A World Health Organization group of scientists have concluded that, "There is no doubt that the termination of pregnancy may precipitate a serious psychoneurotic or even psychotic reaction in a susceptible individual."[69]

Apart from the death brought to the unborn and the mortality or morbidity suffered by the mother as a result of abortion there are also serious dangers to subsequent children of aborted mothers.

Fourteen years after legalizing abortion Hungary reported a 5% increase in premature babies.[70] In addition due to birth injury, postnatal asphyxia and atelectasis (collapsing of the lungs) which are leading causes of death in premature infants, Hungary's infancy mortality rate was 1,278.2 per 100,000 live births compared to a 549.4 per 100,000 rate for the U.S.[71] Following legalized abortion on request the perinatal mortality rate in Hungary had doubled.[72]

The frequency of spontaneous abortions (miscarriages) in women who have undergone legal abortions has been reported as 30 to 40% higher than in cases where women had not been aborted.[73] Furthermore, the incidence of fetal death during pregnancy is twice as great for a woman who had an abortion compared to those who hadn't.[74] Dr. Kelaris, a leading gynecologist in Greece, speaks of his country's biggest social problem being women not being able to retain pregnancies due to their having been previously aborted so often.[75]

Findings such as these have led one authority to conclude:

> Induced abortion plays an important role in the development of a subsequent child ... the impact of premature birth on infant mortality and of the mental and physical development of the child is connected with the frequency of abortions.[76]

Pound of Flesh

Just as Shylock, the Jew, cannot be prejudiced with impunity, neither can the human fetus be aborted without grave reprisals being suffered by his mother, her future progeny, the medical profession and all of society. The merchants of calumny who banalize the human fetus and suppress the medical risks which abortion represents are bargaining for their own pound of flesh.

The desire to believe that the human fetus is not human and that abortion does not give rise to frequent and serious complications is very strong in some people. They would prefer that the world should bend to their beliefs rather than they themselves be enlarged by a world which is wider than will. Perhaps the essence of prejudice lies in a fear of accepting what is different. But in the case of the human fetus this prejudice takes an ironic twist. We all contain the unborn. We are the unborn. The abortionist is the inverse of Narcissus. He hates his own repeated image. He has no memory. He has no ontogeny. The human fetus tells him how small he must be. In re-

jecting his own smallness, he then lashes out against the unborn. To accept one's smallness requires greatness. This is the essential paradox of man.

In accepting his smallness, his finitude, his fallibility, man honors a truth and thereby acknowledges the universe. When he insists upon nothing less than his own perfection emancipated forever from any attachment or resemblance with the humble fetus, he acknowledges only his vanity.

Inseparable from a fear of finitude is a terror of death. If man grows from a single cell, what fortress in this world can ever be a safeguard against his destruction? If man's life begins in the penumbra of nothingness, that shadow must remain to lurk behind his every heartbeat.

> As he came forth from his mother's womb, so again shall he depart naked as he came, having nothing from his labor that he can carry in his hand.[1]

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74 World Health Statistics Report, *op. cit.*

75 Dr. P. Marx *op. cit.*

76 A. Klinger *op. cit.*

77 *Ibid.*, p. 14.

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SENATOR TURNAGE MOVED THAT THE BILL DO PASS AS AMENDED; SECONDED BY SENATOR GILFEATHER. MOTION CARRIED UNANIMOUSLY.

SB 646--SENATOR MOORE MOVED THIS BILL DO PASS; SECONDED BY SENATOR TURNAGE. MOTION CARRIED.

SB 715--SENATOR TURNAGE MOVED THE AMENDMENTS DO PASS; SECONDED BY SENATOR MOORE, MOTION CARRIED.

SENATOR TURNAGE MOVED THE BILL DO PASS AS AMENDED, SECONDED BY SENATOR MOORE. MOTION CARRIED

SB 716--SENATOR TURNAGE MOVED THE AMENDMENTS DO PASS; SECONDED BY SENATOR MOORE. MoTION CARRIED.

SENATOR TURNAGE MOVED THE BILL DO PASS AS AMENDED, SECONDED BY SENATOR MOORE. MOTION CARRIED.

SB 717--SENATOR TURNAGE MOVED THE AMENDMENT DO PASS; SECONDED BY SENATOR MOORE. MOTION CARRIED.

SENATOR TURNAGE MOVED THE BILL DO PASS AS AMENDED. SECONDED BY SENATOR MOORE. MOTION CARIED.

There be ing no further business, the meeting was adjourned to reconvene Thursday, February 14, 1974.

LUKE MCKEON, Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

SECOND HALF - 43rd LEGISLATIVE SESSION 1974 Dat: 2/1

NAME	PRESENT	ABSENT	EXCUSED
Luke McKeon	✓		
Pat Gilfeather	✓		
Paul Boyland	✓		
Mrs. Boots Hall			✓
Miles Romney			✓
Glenn Drake	✓		
Tom Harrison			
Jim Moore	✓		
Jean Turnage	✓		

Each day attach to minutes

The Big Sky Country

MONTANA STATE SENATE

SENATOR WILLIAM R. McNAMER
HELENA ADDRESS:
STATE CAPITOL
HELENA, MONTANA 59601
BILLINGS ADDRESS:
MIDLAND BANK BUILDING
BILLINGS, MONTANA 59101
COMMITTEES:
LABOR AND EMPLOYMENT RELATIONS
FISH AND GAME
BILLS AND JOURNAL

February 12, 1974

Senator Luke McKeon
Chairman, Senate Judiciary Committee

RE: Senate Bills No. 715, 716, 717
Related to Abortion and Sterilization

Dear Senator McKeon:

I hand you the following, with copies of this letter and these enclosures to members of the committee:

1. Revised page 4 of my proposed amendments to Senate Bill No. 715 which revises the amendment at Section 6 (1) (c) by rewriting that subsection and expanding it into an additional subsection (2), and then renumbers former subsections (2) and (3) to make them subsections (3) and (4). This does not change the substance of the subsection but makes it easier to read and understand.

2. Proposed committee amendment to Senate Bill No. 716. This rewrites the bill to put it in conformity with the "conscience" provision of the abortion bill, Senate Bill No. 715. It differs from the introduced Senate Bill No. 715 in requiring that the refusal be based upon grounds of "religious beliefs or moral convictions", which my research and that of the Montana Hospital Association indicates might be constitutionally safer; separates by subsections the right of refusal for public hospitals and health care facilities from private hospitals and health care facilities, since research indicates there may be a question about the constitutionality of such refusal by a public facility, and I wanted the clauses to be severable; and in the case of hospitals and facilities requires that this policy be "stated", and in the

case of individuals that they must put this in writing if requested. These latter provisions were thought by the hospital people to further strengthen the bill, and make it simpler to administer.

3. Proposed standing committee amendment of Senate Bill No. 717. This rewrites the sterilization refusal bill to conform with the revised language in Senate Bills No. 716 and 715.

4. A memorandum of law covering some of the legal points which may be raised by the abortion bill No. 715. It does not include authorities on the conscience bills, but I have authorities available if you would like them.

If the committee would like, I would be glad to be present when you discuss the bills, and would particularly appreciate that opportunity if any amendments are considered, since the bill is rather closely written.

I will take this opportunity to respond to a question raised by Senator Harrison with regard to uncertainty when the stage of viability is reached. The question was: where does the doctor stand if he misjudged viability, did not comply with the informed consent and certification of necessity required by the bill, and the child is then born viable? My answer is that, to the best of my knowledge, under those circumstances normally a D and C or the saline injection method would be used so that the question is moot. Further, the physician normally won't perform an abortion at that stage unless it is necessary to preserve the life or health of the mother, so he may as well proceed with the informed consent and the certification that the procedure is necessary to preserve the life or health of the mother. If the child is born alive under the circumstances given, the physician incurs no additional exposure to a charge of criminal homicide for failing to preserve the life of the child, since all that is required is that he not be negligent in taking reasonable steps to preserve that life once the child is born alive.

If the committee recommends that Senate Bill No. 715 do pass, you will want to consider whether Senate Bill No. 646 by Moore should or should not also be passed over to the House in case Senate Bill No. 715 gets in trouble. I have mixed feelings about this.

Also, Senator Cochrane's "conscience" bills presumably will pass the Senate, but I do think that Senate Bills No. 716 and 717 should also be passed over to the House. They do contain matter mentioned earlier above which I think is important for a conscience bill.

You may have for consideration two other bills relating to abortion coming over from the House. House Bill No. 1035 by Fasbender covers in a very general way the requirements of reporting of abortions. It would seem that if Senate Bill No. 715 passes the legislature, House Bill No. 1035 would not be necessary. House Bill No. 1003 by Holmes covers voluntarily counseling on behalf of a woman seeking abortion. This would seem to be a separate subject matter from the abortion and conscience bills.

Cordially,

WILLIAM R. McNAMER

WRM:dg

enc 4

cc: Senator Gilfeather
Boylan
Hall
Romney
Drake
Harrison
Moore
Turnage

MONTANA ABORTION CONTROL ACT

Legal Memorandum

Introduction

The two 1973 landmark cases before the United States Supreme Court were Roe v. Wade, 410 U.S. 113 (hereinafter cited as Wade) and Doe v. Bolton, 410 U.S. 179 (hereinafter cited as Bolton). In these decisions the Supreme Court emphasized the "right to privacy" and held that "right . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Wade, 35 L. Ed. 2nd, 153.

But the woman's right to privacy is not absolute. Throughout both Wade and Bolton the court emphasized the right to personal privacy must be considered along with important state interests in maintaining medical standards, in safeguarding the mother's health and in protecting potential life. Any new legislation must take all of these interests into account.

Wade Decision

Thus, a woman has the right to be free from unwarranted governmental intrusion. But the majority in Wade repeatedly stated that this right was not absolute. The state may properly assert several important interests in safeguarding health, maintaining medical standards and protecting potential life. At some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of the abortion decision. Wade at page 154. Two separate and distinct interests were clearly recognized by the Court: the compelling state interest in the mother's health, and the compelling state interest in protecting "potential life".

In summary the United States Supreme Court held in the Wade case:

A state criminal abortion statute that excepts from criminality only a ' life saving' procedure on behalf of the mother, without regard to pregnancy state and without recognition of the other interests involved', is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the period prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the period subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the period subsequent to viability the State, in promoting its interest in the potentiality of human life, may if it chooses, regulate, and even forbid abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

The Wade decision, therefore, leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests.

Bolton Decision

The principal holdings in the Bolton case may be summarized as follows:

(a) A pregnant woman does not have an absolute constitutional right to an abortion on demand.

(b) A state criminal abortion statute's requirement that all abortions be performed only in hospitals accredited by the Joint Committee on Accreditation of Hospitals is unconstitutional as not being reasonably related to the purposes of the statute.

(c) A state may adopt standards for licensing all facilities where abortions, from and after the end of the first trimester, may or must be performed, so long as those standards are legitimately related to the objective the state seeks to accomplish, including limiting such facilities to licensed hospitals only.

(d) A state criminal abortion statute which requires approval of a hospital abortion committee before an abortion may be performed in a hospital, even though a pregnant female's personal physician has substantiated the necessity for performing an abortion on his patient, is unduly restrictive of the patient's rights, is not constitutionally justifiable, and serves no legitimate hospital or state interest.

(e) A state criminal abortion statute which prohibits all abortions, except those performed on bona fide state residents, including those abortions which could be performed in private hospitals by private physicians, violates the privileges and immunities clause of Article 4, §2, of the Constitution by failing to protect persons entering the state who seek medical services available there.

Doe vs. Woodahl

In the case of Doe v. Woodahl, 360 F. Supp. 20, United States District Court, District of Montana, Missoula Division, the honorable Judge Russell E. Smith held on May 2, 1973, that Montana's abortion laws (§§94-401 and 94-402, R.C.M. 1947--which are now codified in

§§94-5-611 and 94-5-612) were unconstitutional and void.

The Proposed "Montana Abortion Control Act" Complies with United States Supreme Court Decisions

The Wade and Bolton decisions provided that in addition to a woman's right of privacy in the 14th amendment to allow her to decide whether or not to terminate her pregnancy the State has a definite interest in the adoption of regulations safeguarding health, maintaining medical standards, and protecting potential life. Therefore, this bill is necessary to spell out those provisions and rights.

This act provides limited restrictions upon abortion within the first three months of prenancy. As the Court held in the Wade case, that is a matter which is left to the discretion of the pregnant woman and her attending physician. Section 4 of the act requires that a woman must consent to an abortion before it be performed, and that she be informed of the alternatives to abortion that may be available to her.

This requirement does not impose upon the mother's rights. The Supreme Court stated that at least during the first trimester of pregnancy, the abortion decision was purely a matter between a woman and her doctor. For the state to require the doctor to inform the woman of alternatives and consequences of an abortion is not an unreasonable imposition. In some cases the information may well be needed in order for the woman to make a knowledgeable decision. In any case, it does not prevent the woman from choosing to go ahead with the abortion.

Section 4 of the act also requires that the consent of the woman's spouse be obtained. The Court has not yet decided whether paternal consent is constitutional. In the Wade case, at 35 L.Ed.2d 184, the Court stated in footnote #67:

> "Neither in this opinion nor in Doe v. Bolton do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances...We need not now decide whether provisions of this kind are constitutional."

Section 4 of the act provides for consent of a parent, custodian, or legal guardian of a minor prior to her abortion. The well-being of its children is a subject within the State's constitutional power to regulate. See: Ginsberg v. New York, 390 U.S. 629 (1968). The state's power to control its children therefore, reaches beyond its authority over adults. While a state is restricted in its regulation of an adult's abortion decision, its ability to protect the minors within its borders should provide at least the authority to require parental consent.

Section 6 of the act provides that all abortions in Montana must be performed by a licensed physician to protect the mother.

For the period after the first trimester this act provides (as the Supreme Court in the Wade and Bolton cases allows) that all abortions be performed in a hospital.

For the period subsequent to viability this act, in promoting the State's interest in the potentiality of human life, provides (as the Supreme Court in the Wade and Bolton decisions allowed) that no abortion is legally authorized at this period unless necessary to preserve the life and health of the pregnant woman.

The Supreme Court in the Bolton case held as unconstitutional a state's requirement that two licensed physicians concur in the judgment of a pregnant woman's doctor that an abortion should be performed. Section 6 (1) (c) (ii) of the act provides that no abortion may be performed within the state of Montana after viability of the fetus, unless two other licensed physicians have first examined the patient and concurred in writing with such judgment. Section 6 of this act is distinguishable from the Bolton case and justifiable. The requirement of section 6 that two other licensed physicians examine the patient and concur in writing with her doctor applies only after viability of the fetus, at which time the state, in promoting its interest in the potentiality of human life, may regulate abortions. Such regulatory authority should certainly include the right for the state to require three (3) doctors to determine the medical necessity of an abortion after viability of the fetus.

Conclusion

The major restriction imposed on abortion by this act is that it is forbidden after viability, except to save the life or health of the mother. This is clearly within the Court's guidelines.

There remains the definition of viability. This act defines it as "the potential ability of a fetus to live outside the mother's womb, albeit with artificial aid." The Supreme Court did not specifically define viability but referred to it as the time when the fetus "presumably has the capability of meaningful life outside the mother's womb."

In the Wade decision the Court made reference to medical dictionaries' definition of viability as the point at which the fetus becomes "potentially able to live outside the mother's womb, albeit

with artificial aid". According to that definition, viability is usually placed at about seven months (28) weeks, but may occur as early as 24 weeks.

The Supreme Court tried not to decide when life begins but only to decide at what point there exists an interest strong enough to limit the woman's rights and concluded that "viability" is a "logical and biological" point. If the fetus can live outside the mother it must at that point possess an independent life--a life that the state can protect--a life separate from the mother. The Court recognized that when the state's interests become sufficiently important, the state may override any rights the mother may have because her rights are not absolute. This proposed legislation does just that.

SENATE BILL 715 Senator McNamer, chief sponsor of the measure regulating abortions, stated this bill passed the Senate with only a handful of dissenting votes. Provided a prepared statement (see exhibit). Stated this bill based on one introduced in Pennsylvania because it was the latest bill introduced and would incorporate latest thinking. It complies with the mandate of the supreme court except for a couple of gray areas. This bill is supported by the Montana Hospital Association and complies with the guidelines of the Montana Catholic Conference which takes the position of instead of closing their eyes to problem would like to see something that would protect as many lives as possible. Stated that in this bill once a child is born viable is then subject to the protection of the criminal code rather than the Supreme Court. Stated he would be glad to come to this committee again to answer questions. Proponent John Frankino will provide a prepared statement to the committee.

Proponent Steven Karys, M.D. with the State Department of Health stated they supported the bill with a few reservations concerning which he provided prepared statement. Also stated Bob Campbell, state president of the ACLU, has reservations about Section 4, (3) and Section 5 and feels this could take criminal law farther than it has ever gone before, takes criminal law into the operating room.

Proponent Dr. Wilson representing the Department of Health stated there would be costs involved in setting up a reporting system. Would take $2,500 to $5,000 to pay for it and thinks a fiscal note should be requested to this bill. Dr. John Anderson, M.D., Department of Health, stated they prefer Senator Moore's bill except for counselor in mental hygiene clinics, pointed out SB 715 has no counseling provision. The health department will be responsible for carrying out regulations of this bill and wants anything removed which might be encroaching into law and will cause cases. Also feels there could be some political issues evolve from the misdemeanor section.

Proponent Chadwick Smith offered the same amendment to this bill as to Senate Bill 716 and 717, otherwise feels this bill is well constructed. No other proponents. No opponents. Hearing closed.

The meeting adjourned at 10:40 AM.

DY:pb

DAN YARDLEY, VICE-CHAIRMAN

Tel. (406) 442-5825

MONTANA CATHOLIC CONFERENCE

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John C. Sheehy, Esq.
Billings, Montana

February 21, 1974

TO: The Honorable Dan Yardley
Acting Chairman, House Judiciary Committee

RE: Abortion Legislation

The present situation is that:

1. there is no prohibition of abortion in Montana. The decisions of the United States Supreme Court, as applied through the District Court action in Montana, voided existing prohibitions in Montana law. On January 22, 1973 the United States Supreme Court issued two rulings affecting abortion laws in this country. The majority opinion held that a woman's right to privacy includes the right to determine with her physician whether to have an abortion. This right of privacy may be interfered with only for reasons of safeguarding her own health and her own life; or when her child becomes viable, her right of privacy may be restricted by corresponding protection for the right of her child to live;

2. there are proposals before the state legislature to provide the fullest protection possible against abortion under the limits established in the Supreme Court decisions;

3. the Catholic Church and the Montana Catholic Conference has taken a public stand against abortion. Faced with de facto legalization of abortion, this stand has not changed; we are still opposed to abortion.

Given the present situation, the Montana Catholic Conference:

A) endorses and encourages efforts to obtain a constitutional amendment which will enable effective protection for all human life; and,

B) encourages the efforts of the Montana legislators to provide, in the interim, the fullest protection possible for all human life, by establishing in law as many protections and restrictions as are legally available concerning the performance of abortions.

In evaluating various proposals to safeguard human life by restricting the practice of abortion, we consider various principles to be helpful in clarifying the options available to a legislator.

A. It is in the best interest of the State of Montana to protect the life, dignity and health of its citizens. Much of our present legislation is based on this premise. It makes sense; without it, the basis for the state crumbles.

B. The life, health and dignity of the mother must be safeguarded.

For years, abortion legislation has attempted to achieve this through outlawing abortion mills and unsafe practices. This is one of the considerations which may still override the mother's right to privacy, according to the Supreme Court.

This concern for the mother's life, health and dignity may be safeguarded in various ways by law. Some examples include: assuring adequate medical attention and psychological assistance; assuring she is adequately informed of what an abortion entails, its possible effects on her personally, and the alternatives available to her; protection against unscrupulous schemes or even governmental pressure; etc.

C. The life, health and dignity of her child must also be safeguarded, to the extent possible.

This concern forms the basis for on-going medical research, the activities of major philanthropic organizations, and the practice of every obstetrician. This concern may only be expressed in a limited manner in the law, as a result of the Supreme Court's decision; but it can be expressed.

For example, when the child becomes viable everything can be done to protect his life: the procedures used, the time of the operation in relation to gestation, the care taken in performing the procedure, etc. If the only difference between abortion and premature birth in a given case is the fact the mother does not wish to keep the child, the state may intervene on behalf of the unborn but viable infant, and save his life.

D. There should also be the fullest consideration possible for the rights of all who have an interest in, or become involved in, the abortion.

Because of the special relationship in privacy between husband and wife, the rights of the husband may be safeguarded in law. The woman has no more absolute right to privacy than her husband.

Because of the special relationship in privacy between parents and child, the rights of the parents of unmarried minors may be safeguarded in law.

Doctors, nurses and others called on to participate in abortion procedures, particularly those not necessary to save the life or health of the woman, are being asked to participate in a procedure which is not essential, and which for many is objectionable on ethical or moral grounds. Objections in conscience should be safeguarded by law - for individuals, and for institutions which adopt such an ethical position.

We recognize abortion is not an easy issue to face. Montana's legislators must pass some law regulating abortion, or face the alternative of wide-open abortion with no protection for the woman, her child, or the rights of others. We urge that each proposal be evaluated in the light of the principles noted above, and every effort be made to protect the life, health and dignity of all Montanans.

WITNESS STATEMENT

Name STEVEN KAIRYS Date 2/2/17

Address Helena Support ?

Representing SOHaES Oppose ? ✓

Which Bill ? 715 Amend ?

Comments:

This bill has several unconstitution provisions that would certainly be challanged & if won would again leave Montana without any abortion laws

Sec 4 (3) Consent of husbands clause

Sec 5 - Criminal Homocide provision

The bill also involves the Department of Health in a way that is contrary to our philosphy

Sec 5 (4) would requires to devise regulations for the humane disposition of the fetus. This is not a public health matter

- (2) Pathology of the aborted tissue

Sec 7 (6) would make us a watchdog of the STATE & make very inaccurate and reporting devise that we devise

Please leave prepared statement with the committee secretary.

MONTANA ABORTION CONTROL ACT

I am personally opposed to all abortion except where necessary to preserve the life of the mother.

I believe the United States Supreme Court not only was wrong, but acted beyond its constitutional powers. I favor a constitutional amendment to reverse their decision.

However, in the meantime, maximum control of abortion must be maintained by the state. I believe this bill will do that, and at the same time satisfy those members of the legislature who believe the Supreme Court decision must be recognized. I, therefore, hope this bill will produce the agreement necessary for the 43rd Legislature to get some control over the situation.

The bill frankly aims at reaffirming the tradition of Montana law to protect human life, and restricts abortion to the fullest extent permissible under the Supreme Court decision.

It requires the physician to fully inform the mother of the effects of, and alternatives to, her decision. It requires the consent of her spouse, or if an unmarried minor, a parent.

Abortion in the late stages of pregnancy is prohibited unless necessary to preserve the life or health of the mother. The life of the child aborted alive is fully protected by law.

The bill requires full reporting on abortions, subject to the ex-mother's right of privacy as to disclosure of her name. It prohibits advertising for abortion.

The bill fully protects the right of any individual or hospital to refuse to participate in an abortion.

Tom Mc Manus

MONTANA ABORTION CONTROL ACT

Legal Memorandum

Introduction

The two 1973 landmark cases before the United States Supreme Court were Roe v. Wade, 410 U.S. 113 (hereinafter cited as Wade) and Doe v. Bolton, 410 U.S. 179 (hereinafter cited as Bolton). In these decisions the Supreme Court emphasized the "right to privacy" and held that "right . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Wade, 35 L. Ed. 2nd, 153.

But the woman's right to privacy is not absolute. In both Wade and Bolton the court emphasized the right to personal privacy must be considered along with important state interests in maintaining medical standards, in safeguarding the mother's health and in protecting potential life. Any new legislation must take all of these interests into account.

Wade Decision

Thus, a woman has the right to be free from unwarranted governmental intrusion. But the majority in Wade repeatedly stated that this right was not absolute. The state may properly assert several important interests in safeguarding health, maintaining medical standards and protecting potential life. At some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of the abortion decision. Wade at page 154. Two separate and distinct interests were clearly recognized by the Court: the compelling state interest in the mother's health, and the compelling state interest in protecting "potential life".

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(a) For the period prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

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The Proposed "Montana Abortion Control Act" Complies with United States Supreme Court Decisions

The Wade and Bolton decisions provided that in addition to a woman's right of privacy in the 14th amendment to allow her to decide whether or not to terminate her pregnancy the State has a definite interest in the adoption of regulations safeguarding health, maintaining medical standards, and protecting potential life. Therefore, this bill is necessary to spell out those provisions and rights.

This act provides limited restrictions upon abortion within the first three months of prenancy. As the Court held in the Wade case, that is a matter which is left to the discretion of the pregnant woman and her attending physician. Section 4 of the act requires that a woman must consent to an abortion before it be performed, and that she be informed of the alternatives to abortion that may be available to her.

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Section 4 of the act also requires that the consent of the woman's spouse be obtained. The Court has not yet decided whether paternal consent is constitutional. In the Wade case, at 35 L.Ed.2d 184, the Court stated in footnote #67:

"Neither in this opinion nor in Doe v. bolton..do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances...We need not now decide whether provisions of this kind are constitutional."

Section 4 of the act provides for consent of a parent, custodian, or legal guardian of a minor prior to her abortion. The well-being of its children is a subject within the State's constitutional power to regulate. See: Ginsberg v. New York, 390 U.S. 629 (1968). The state's power to control its children therefore, reaches beyond its authority over adults. While a state is restricted in its regulation of an adult's abortion decision, its ability to protect the minors within its borders should provide at least the authority to require parental consent.

Section 6 of the act provides that all abortions in Montana must be performed by a licensed physician to protect the mother.

For the period after the first trimester this act provides (as the Supreme Court in the Wade and Bolton cases allows) that all abortions be performed in a hospital.

For the period subsequent to viability this act, in promoting the State's interest in the potentiality of human life, provides (as the Supreme Court in the Wade and Bolton decisions allowed) that no abortion is legally authorized at this period unless necessary to preserve the life and health of the pregnant woman.

The Supreme Court in the Bolton case held as unconstitutional a state's requirement that two licensed physicians concur in the judgment of a pregnant woman's doctor that an abortion should be performed. Section 6 (1) (c) (ii) of the act provides that no abortion may be performed within the state of Montana after viability of the fetus, unless two other licensed physicians have first examined the patient and concurred in writing with such judgment. Section 6 of this act is distinguishable from the Bolton case and justifiable. The requirement of section 6 that two other licensed physicians examine the patient and concur in writing with her doctor applies only after viability of the fetus, at which time the state, in promoting its interest in the potentiality of human life, may regulate abortions. Such regulatory authority should certainly include the right for the state to require three (3) doctors to determine the medical necessity of an abortion after viability of the fetus.

Conclusion

The major restriction imposed on abortion by this act is that it is forbidden after viability, except to save the life or health of the mother. This is clearly within the Court's guidelines.

There remains the definition of viability. This act defines it as "the potential ability of a fetus to live outside the mother's womb, albeit with artificial aid." The Supreme Court did not specifically define viability but referred to it as the time when the fetus "presumably has the capability of meaningful life outside the mother's womb."

In the Wade decision the Court made reference to medical dictionaries' definition of viability as the point at which the fetus becomes "potentially able to live outside the mother's womb, albeit

with artificial aid". According to that definition, viability is usually placed at about seven months (28) weeks, but may occur as early as 24 weeks.

The Supreme Court tried not to decide when life begins but only to decide at what point there exists an interest strong enough to limit the woman's rights and concluded that "viability" is a "logical and biological" point. If the fetus can live outside the mother it must at that point possess an independent life--a life that the state can protect--a life separate from the mother. The Court recognized that when the state's interests become sufficiently important, the state may override any rights the mother may have because her rights are not absolute. This proposed legislation does just that.

LOR SMITH, SR. (1862-1934)
R. SMITH (1896-1956)
LOR SMITH (1899-1969)
W. SMITH
WICK H. SMITH
RT J. SEWELL, JR.

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HELENA, MONTANA 59601

January 31, 1974

Senator William R. McNamer
State Capitol
Helena, Montana

Dear Bill:

In regard to the questions contained in your letter of January 25, 1974, I refer you to Sandmire M.D. vs. Bellin Memorial Hospital, 479 Federal 2d 756 (1973) wherein the Federal appellate court ruled that a private hospital did not, by accepting funds under the Hill-Burton Act, surrender rights which it otherwise possessed to determine whether or not it would accept abortion patients. It appears clear from this case that receipt of government funds from any source does not affect the private hospital's conscience determination because the Court reasoned that since nearly every hospital receives some kind of government funds, such consideration would circumvent every other consideration of private rights.

I do not know of any court decision which states that the reason for a hospital's determination or an individual's determination to exercise its conscience against participating in abortion procedures must always be based upon religious belief or moral conviction but the amendments proposed by Senator Frank Church (Democrat, Idaho) to the Public Health Service Act Extension (S-1136) provides specifically that neither a court nor a public official may require an individual to assist in sterilization or abortion procedures if such assistance is contrary to his religious beliefs or moral convictions, and if this should become the standard in Federal law, I believe state law should conform. Unless an individual or an institution states such grounds for its refusal there is the possibility that the refusal is arbitrary. If the hospital elects to refuse to participate in abortion procedures for religious or moral reasons, it should so state as a matter of policy in its By-Laws. If an individual objects for such reasons, it should be entered upon a signed statement and kept in the hospital records to be available should any question arise.

I cannot quickly put my fingers on the authority concerning the distinction between private and public hospitals upon this question, but in the course of my research on the many hospital problems arising during the recent months, I do recall reading that a public hospital does not have the power to exercise the right of private conscience as does a privately-owned institution, but nevertheless, it is my opinion that individuals employed in the public hospital can still exercise their individual right to follow their conscience in such matters if it is not an arbitrary decision, or, in other words, if it is based upon religious belief or moral conviction.

I hope this will be of some assistance to you. If you need more research in the matter, I will endeavor to do it for you.

Sincerely,

CHADWICK H. SMITH

CHS:y

WILLIAM G. BAUCUS
TED CORONTZOS
JOHN F. IWEN
R. WILLIAM WALSH

BAUCUS, CORONTZOS, IWEN & WALSH
ATTORNEYS AT LAW
201 DAVIDSON BUILDING
GREAT FALLS, MONTANA 59403

P. O. BOX 1723
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TELEPHONE 761-4800

4 February 1974

Senator William J. McNamer
Capitol Building
Helena, Montana 59601

Re: Montana Catholic Conference

Dear Senator McNamer:

I have received a carbon copy of your letter of January 29, 1974 regarding the "Conscience" bills. I have been asked by the Catholic conference to write you a letter concerning the matter.

You ask whether the refusal provided for in the bills should be based on religious, moral or ethical grounds. It is our opinion that in the case of an individual, it is necessary that the refusal be based on religious, moral or ethical grounds, and perhaps only on religious or moral grounds. In Doe v. Bolton, at 35 L.Ed.2d 216, the Court said as follows:

> "Under § 26-1202(c) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26-1202(c) affords adequate protection to the hospital...."

The following statement appears in the Seventh Circuit case, Doe v. Bellin Memorial Hospital, ___ F.2d ___ (1973), at ___ F.2d ___:

> "There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves."

The Court cites the above-quoted portion of Doe v. Bolton in support of this statement. Then the Court states as follows at ___ F.2d ___:

"Thus, we assume that there is no constitutional objection to a state statute or policy which leaves a private hospital free to decide for itself whether or not it will admit abortion patients or to determine the conditions on which such patients will be accepted. Plaintiffs contend, however, that the hospitals right to make that decision has been limited by two Federal statutes, the Hill Burton Act and § 1 of the Civil Rights Act of 1871, now 42 USC § 1983. We are not persuaded that either of these statutes, or the two in combination, have that effect."

Also, under the Health Programs Extension Act of 1973, Title IV, § 401, it is provided as follows:

"(b) The receipt of any grant, contract, loan or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act, by any individual or entity does not authorize any court or any public official or other public authority to require...."

"(2) such entity to--

"(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facility is prohibited by the entity on the basis of religious beliefs or moral conviction...."

This section was cited by the recent decision by Judge Smith of the Montana District in Taylor v. St. Vincent's Hospital, on October 30, 1973. Judge Smith said of this Act as follows:

"By its plain language, this act prohibits any Court from finding that a hospital which receives Hill Burton funds, is acting under color of state law. The above sections were specifically aimed at such results as evidenced by the legislative history."

Also citing the above-quoted section, an Idaho Federal District Judge in Watkins v. Mercy Medical Center, decided July 3, 1973, found [illegible]

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physicians from performing sterilization or abortion operations on solely religious grounds as the hospital is financed and operated almost entirely by the Catholic Church. The Court relied on the above-quoted section, stating further that:

> "Mercy Medical Center has the right to adhere to its own religious beliefs and not be forced to make its facilities available for services which it finds repugnant to those beliefs. The hospital cannot discriminate against those who believe otherwise, but it can set up reasonable safeguards to insure that others do not use their facilities for services which the hospital does not religiously believe should be offered.... To hold otherwise would violate the religious rights of the hospital."

You have further inquired whether the individual person must refuse on grounds stated in writing. We find no authority for the proposition that in order to assert First Amendment rights an individual must state his position in writing. With reference to the hospital, we believe it would be desirable for the hospital to state its position in writing in order to prevent any ambiguity on the matter insofar as the ambiguity could be prevented by a clear statement of its position. However, for purposes of the statute, we see no necessity for requiring that position be stated in writing. In fact, it would appear to be preferable to allow latitude in this regard in the event the hospital in fact does refuse the use of its facilities, on religious or moral grounds, but the grounds are not stated in writing.

We conclude that there is some danger that the statute may be found to be vague and uncertain in the event that the grounds for refusal are not limited to First Amendment grounds, and that the statute should be amended to [illegible] to allow abortions or sterilizations [illegible] for either private or public hospitals to refuse such services on [illegible] grounds.

If you have any further questions, please call.

BAUCUS, CORONTZOS, IWEN & WALSH

R. William Walsh

RWW/jt

cc: Frederick Paffe
Lee J. Peter Stevens
Dean Preston

SENATE BILL NO. 715

MR. CHAIRMAN:

I move to amend Section 8 of the Third Reading copy of Senate Bill No. 715 as follows:

1. On page 10, in line 8, by deleting the words "Any person who knowingly interferes or attempts" and by inserting in lieu thereof the following "It shall be unlawful to interfere or attempt"

2. On page 10, in lines 10 and 11, by deleting the following ", shall be guilty of a misdemeanor"

JUDICIARY COMMITTEE

February 26, 1974

The thirty seventh meeting of the House Judiciary Commitee was called to order in Room 436 of the Capitol Building at Helena, Montana on Tuesday, February 26, 1974 at 9:10 AM. Representative Dan Yardley, Vice-Chairman, presided. All members were present except Representatives Hall, Baucus, Lucas, Marbut and Warfield, absent, excused.

Acting Chairman Yardley opened the meeting stating he was sorry for the crowded conditions, had not realized so many would be present for hearing on Senate Bill 715. He explained that on Thursday, February 21st hearing was held on this bill as well as five other bills which were part of the abortion bill package. Due to short notice hearing also scheduled for today on this particular bill.

SENATE BILL 715 Senator McNamer, chief sponsor, stated that he would turn the hearing over to those who wished to testify. Proponent John Frankino, representing Montana Catholic Conference, testified in support of bill (see prepared statement). Proponent Sandra Regnerus, representing Gallatin Valley Association for Christian Political Action and Right to Life Groups, testified in support of bill (see prepared statement). Proponent Sally Lind, representing Missoula Right to Life, testified (see prepared testimony). Mrs. Nicholas Dale testified on behalf of the Right to Life Group. Other proponents who testified were a Mrs. John Rose, Billings; Kay Nelson, Billings and Chad Smith who supports bill but has an amendment which would take out criminal enforcement of measure.

Additional proponents who did not testify were:
Herman R. Van Dyken, representing Gallatin Valley Political Christian Action (Right to Life)
Mary Olson, Missoula
Shirley Vanderby, Gallatin Valley Association for Christian Political Action
Cecelia Kopetski, Montana Right to Life Association
Wilson Vanderby, Gallatin Valley Association for Christian Political Action
Kay Molendyk, Gallatin Valley Assoc. for Christian Political Action
Bernice Vesser, " " " " " " "
Sister Mary Kaye Nealen, Montana Right to Life, Missoula delegation
Julie Wheeler, Right to Life
Sally Lind, Missoula Right to Life (left prepared statement)
Louise M. Hoppe, Right to Life, Missoula delegation
Sue Ballas, Right to Life Association, Missoula delegation
Karon Wagner, Right to Life Association, Missoula delegation
Eileen M. Browne, Missoula Right to Life delegation
John C. Wilson, State Department of Health, urged an amendment
Michelle Bond, Missoula Right to Life delegation
Patricia Merritt, Missoula Right to Life Association

Jackie M. Johnson, Missoula Right to Life Association
Joan Ballas, Missoula Right to Life delegation
Henry J. Vosser, Gallatin Valley Christian Political Action
Mrs. Nicholas Degel, Jr., Billings Alternatives to Abortion Assoc.
Janet Grenfell, Missoula
Sister Anna Marie Koval, Missoula Right to Life delegation
Doris Whaley, Missoula Right to Life delegation

Chairman Yardley stated that since the proponents had taken twenty five minutes he would allow twenty five minutes for testimony to the opponents.

Opponent Professor Larry Elison, University of Montana Law School stated he was testifing on behalf of both himself and the Planned Parenthood and American Association of University Women. Mr. Elison stated he would send prepared testimony but he never did. In his testimony he stated this bill shows very little respect for the law. Stated many of definitions in the bill are already in the codes of Montana and these definitions in bill are not in conformity with those in the codes. Stated he also felt the decision of abortion must be left to the pregnant woman's physician. Feels this bill attempts to do something he finds most unconstitutional. Also feels the language in appaling in terms of trying to make some sense out of it; urged committee to very carefully review these bills. Feels they also allow invideous discrimination between various groups of people.

Opponent Emily Loring, an attorney from Great Falls, stated she supports much said by proponents of this bill but does want to comment on a special few points which are: 1) What the law is presently; 2) What the supreme court said; 3) subsection (1) is involving the state in a professional relationship between the physician and the patient; 4) The state has no business saying the husband has to consent; 5) In requiring consent of two additional physicians are slowing process of abortion, making it more difficult. Stated this law will not stop abortions, questions the provision in bill providing a right of conscience and feels public hospital shouldn't be able to refuse, questioned how a hospital can have a moral conviction. Urged a do not pass on this bill.

Opponent Reverend Wm. Burkhardt, representing the Plymouth Congregational Church in Helena stated he represented the religious and moralperspective, in the role of counselor to many he can see where a law of this nature needs to be flexible, urged a do no pass.

Other opponents to bill were:
Jo Ann Kairys, Helena, represent self
Patricia Liston, representing self, Helena
Agnes Herak, representing self, Helena
Senator Antoinette Rosell, Billings
Dee Capp, representing self, Helena
Representative Polly Holmes, representing self, urged amending bill (see prepared statement)

Natalie Cannon, representing Montana American Association of University Women (see prepared statement)
Dr. Steven Kairys, representing Montana State Department of Health, (see prepared statement)

Senator McNamer in closing thanked everyone for their interest in this piece of legislation, their serious candidness and concern for persons involved. Stated he felt he could clarify some serious misunderstandings. Among other rebuttal, Senator McNamer stated much emphasis placed upon necessity to protect aborted and viable child, must also understand criminal homicide doesn't take place until child separated from his mother. Stated are balancing two things here, at point of viability have to balance the interests of the mother against that of the child. Stated he feels this bill carefully implements decisions of Supreme Court. Supreme Court has left open the are of "after viability". Agreed there may be some question of consent of thespouse. Feels this bill puts abortion in a controlled and reported situation.

Hearing was then opened to questions from committee members. Representative Roberts point out the definition of human being, tehn referred back to definition of abortion, then bill speaks of aborted alive, questioned if there wasn't some problem here, feels there is also a problem with term "fetus" and ought to be very careful with terms here. Senator McNamer replied he would have no objection to using word "infant" instead of "fetus" where talking of live birth. Representative Towe stated he couldn't agree more with what most people have said in that they respect life but pointed out that yesterday they advocated the death penalty. He also questioned the somewhat inconsistent actions of the Senate in not going along with the Supreme Court decision of punitive rites of the father. Also concerned about employees of public hospitals.

Representative McKittrick stated that Professor Elison has indicated that this legislation changes common law and that he finds lots of areas of common law are not good. Also questioned as the law stands now if a thalidomide baby born alive has the same kind of rights as any other child? Answer to this was yes, whether a vegetable or not.

Representative Roberts questioned section 7 requiring reporting to the State Board of Health. Senator McNamer's idea of this reporting procedure is: 1) there has to be some way to insure provisions of law are carried out, and 2) it is important to have publicly available statistics of effects of abortion on mother's health and other data which will improve understanding of abortion. Representative Bateus stated he was concerned with consent provisions in section 4 and questioned how important these are to which Senator McNamer replied he would not recommend passing the bill without the consent provisions.

Hearing was then closed and the meeting adjourned at 10:35 AM.

DY:pb

DAN YARDLEY, VICE-CHAIRMAN

WITNESS STATEMENT

Name Sandra Regnerus Date Feb 26, 1974

Address RR 2 Box 106 Support ? Yes

Representing Gallatin Valley Assoc. for Chr. Pol. Action and Right to Life Oppose ?

Which Bill ? S.B. 915 Amend ?

Comments:

In New York in 1971 3,900 fetuses were delivered by hysterotomy - thereby becoming infants. * They were all alive - born - but not by the usual method. We are concerned about these infants - All but two of these were allowed or encouraged to die. We want to safeguard the lives of these children, even if their mothers did not intend for them to live.

Handbook on Abortion p. 271

Please leave prepared statement with the committee secretary.

Support for Senate Bill 715

The Gallatin Valley Association
for Christian Political Action
February 26, 1974

SUPPORT FOR SENATE BILL 715

We support Senator McNamer's bill 715 as he presented it to the Senate Judiciary Committee on February 6, 1974. Since we were unable to obtain a copy of it as it was presented to the House, we hope that the bill contains the intent of the original in its entirety.

We would single out two sections of the bill as needing special support as some have expressed objections to them. We would also correct some commonly expressed errors used to defend the need for abortion even though the defendants claim abortion is undesirable and should only be used as a last resort.

First, we support the right of a husband to consent to his wife's abortion or to prevent it. Marriage is a mutual agreement between a man and a woman in which they both give certain rights to each other and assume certain responsibilities. The most important of these so far as the State is concerned is the propigation and support of children. The State must try to insure that provision will be made for the birth and subsequent nuture of another generation of citizens. Traditionally, the State has sought to enforce the husband's duties to support his children. His consent is based on this responsibility. The State cannot take away his right to the birth of lawful children without absolving him of his responsibility to support his wife and children. If the State would negate his rights and responsibilities, it would thereby undermine marriage and destroy the foundations of our society. Senate Bill 715 gave a husband the right to consent only if he was living with his wife, and, therefore, was presumed to be supporting her. Much as others would like to give any natural father the right to the birth of his child, we believe he does not merit this right unless he wants to adopt the child and assume full responsibility for it.

Secondly, the State should assume the cost of assuring the same medical care available to premature infants to all babies who survive the abortion procedure. (We agree with exceptions taken in S.B. 715) Since S.B. 715 makes it difficult to get

an abortion for any other reason than to save the life of the mother during the last trimester when the possibility of delivering a viable baby is the most likely, this will not be as costly as it might seem at first.

Also, the assurance that the State values the life of the unborn should encourage a woman to put more value on the life of her prospective child. Thus a woman whose life or health is not threatened by pregnancy might be encouraged to carry to term so that others who could not have the child they wanted can have the joy that children bring. This would hold especially true in the last half of pregnancy since the usual method of abortion after twenty weeks is a Caesarian section or hysterotomy which delivers a living, though premature baby. A normal delivery and a healthy baby would seem reasons enough to warrant a few weeks or months of waiting. [1]

Most important, this clause emphasizes the State's interest in the rights of the unborn and indicates that we are not willing to put a price tag on human life.

We are just as concerned for the life and health of the mother as we are for that of her baby. Medical statistics from Denmark, Sweden and Canada indicate that almost twice as many maternal deaths result from abortion as from childbirth. [2]

Another factor to consider is the psychological health of those who have abortions. Studies show that the women whose mental health would indicate the necessity of an abortion are the very women who suffer the greatest psychological trauma after an abortion. [3] The cost of encouraging a woman to carry to term and put her baby up for adoption if that were desirable under the best counseling available would be far less than that of her abortion and probable subsequent confinement and care at Warm Springs. And the human misery thereby avoided would be immeasurable.

[1] Handbook on Abortion, Dr. and Mrs. J.C. Willke, Hilts Publishing Co., Cincinnati, Ohio, p. 27.

[2] Ibid. p. 69

[3] Ibid. pp. 46+47,

Commonly available information on birth control methods assures us that the most highly recommended measures of contraception are 95-99.5% effective.[4] Sterilization is 100% effective, effective, although recommended only for those married couples who cannot assume the responsibility of an additional child. We view children as blessings, not burdens. Women should accept the slight risk of pregnancy as the responsibility for her sexuality. No one forces her to be sexually active and so no one is forcing her to take that risk. Therefore, the term "compulsory pregnancy" is misleading. It has the connotation of sentencing her for some crime she has committed.

When an unplanned pregnancy is excessively burdensome, other measures than abortion should relieve a woman of the reasons which makes pregnancy--ordinarily a blessing--intolerable. Ridding her of the fetus does nothing for her other problems and does nothing to assure that she won't need another abortion in a matter of months.

If the hypothetical mother of six children who cannot face the prospect of another child exists at all, she is the victim of ignorance. Let us educate people to accept their responsibilities and encourage them to prevent the conception of unwanted children. When birth control fails, adoption would be far more just and humane for the mother, the unborn and society. Let's not become a race of brutes who would treat a completely innocent unborn child as a potential criminal and "think him as the serpent's egg which hatched would as his kind grow mischievous and kill him in the shell."

For all of these considerations, we urge the House to follow the example of the Senate and to pass S.B. 715

[4] The Sexual Side of Love, Maureen Green, Aldus Books, London, pp. 96+97.

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Billings, Montana

February 28, 1974

TO: The Honorable Dan Yardley
Acting Chairman, House Judiciary Committee

RE: Abortion Legislation
S.B. 715

The present situation is that:

1. there is no prohibition of abortion in Montana. The decisions of the United States Supreme Court, as applied through the District Court action in Montana, voided existing prohibitions in Montana law. On January 22, 1973 the United States Supreme Court issued two rulings affecting abortion laws in this country. The majority opinion held that a woman's right to privacy includes the right to determine with her physician whether to have an abortion. This right of privacy may be interfered with only for reasons of safeguarding her own health and her own life; or when her child becomes viable, her right of privacy may be restricted by corresponding protection for the right of her child to live;

2. the proposal before this Committee appears to provide the fullest protection possible against abortion under the limits established in the Supreme Court decisions;

3. the Catholic Church—and the Montana Catholic Conference—has taken a public stand against abortion. Faced with de facto legalization of abortion, this stand has not changed; we are still opposed to abortion.

Given the present situation, the Montana Catholic Conference:

(A) endorses and encourages efforts to obtain a constitutional amendment which will enable effective protection for all human life; and,

(B) encourages the efforts of the Montana legislators to provide, in the interim, the fullest protection possible for all human life, by establishing in law as many protections and restrictions as are legally available concerning the performance of abortions.

In evaluating various proposals to safeguard human life by restricting the practice of abortion, we consider various principles to be helpful in clarifying the options available to a legislator.

A. It is in the best interest of the State of Montana to protect the life, dignity and health of its citizens. Much of our present legislation is based on this premise. It makes sense: without it, the basis for the state crumbles.

B. The life, health and dignity of the mother must be safeguarded. For years, abortion legislation has attempted to achieve this through outlawing abortion mills and unsafe practices. This is one of the considerations which may still override the mother's right to privacy, according to the Supreme Court.

This concern for the mother's life, health and dignity may be safeguarded in various ways by law. Some examples include: assuring adequate medical attention and psychological assistance; assuring she is adequately informed of what an abortion entails, its possible effects on her personality, and the alternatives available to her; protection against unscrupulous schemes or even governmental pressure; etc.

C. The life, health and dignity of her child must also be safeguarded to the extent possible. This concern forms the basis for on-going medical research, the activities of major philanthropic organizations, and the practice of every obstetrician. This concern may only be expressed in a limited manner in the law, as a result of the Supreme Court's decision; but it can be expressed.

For example, when the child becomes viable everything can be done to protect his life: the procedures used, the time of the operation in relation to gestation, the care taken in performing the procedure, etc. If the only difference between abortion and premature birth in a given case is the fact the mother does not wish to keep the child, the state may intervene on behalf of the unborn but viable infant, and save his life.

D. There should also be the fullest consideration possible for the rights of all who have an interest in, or become involved in, the abortion. Because of the special relationship in privacy between husband and wife, the rights of the husband may be safeguarded in law. The woman has no more absolute right to privacy than her husband.

Because of the special relationship in privacy between parents and child, the rights of the parents of unmarried minors may be safeguarded in law.

Doctors, nurses and others called on to participate in abortion procedures, particularly those not necessary to save the life or health of the woman, are being asked to participate in a procedure which is not essential, and which for many is objectionable on ethical or moral grounds. Objections in conscience should be safeguarded by law - for individuals, and for institutions which adopt such an ethical position.

We recognize abortion is not an easy issue to face. Montana's legislators must pass some law regulating abortion, or face the alternative of wide-open abortion with no protection for the woman, her child, or the rights of others. We urge that the proposed bill be evaluated in the light of the principles noted above, and every effort be made to protect the life, health and dignity of all Montanans.

WITNESS STATEMENT

Name Polly Holmes Date 3/26/84

Address _____ Support ? _____

Representing Myself Oppose ? ✓

Which Bill ? SB 215 Amend ? Greatly

Comments:

I'd much prefer SB646, only slightly amended. My major concern is with requiring the doctor to inform and get consent from the father or the mothers parents.

The problems of a woman who seeks abortion would be greatly increased by having to deal with family problems against her will at a time like this.

I remind the committee of the alternative bill which has backed the wrong. This bill would make a difference in the need for the procedure.

Please leave prepared statement with the committee secretary.

NAME: Natalie Cannon DATE: 2/24/94

ADDRESS: 2130 Highland Helena MT

REPRESENTING WHOM? MT Area Assoc of Univ Women

APPEARING ON WHICH BILL? SB 715

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: Montana Division of AAUW strongly opposes SB 715 as being unnecessarily restrictive and of dubious constitutionality. We support SB 646 with section (5) amended counseling amended out as it is of doubtful constitutional We believe HB 1003, Holmes, making counseling available, that has already passed the House fulfills this need.

For almost four years, most ann AAUW has had a position supporting abortion as a decision between a woman and her doctor - duly voted on in two state conventions and strongly supported by most members.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Tess Kairys DATE: 2/26/14

ADDRESS: MCC

REPRESENTING WHOM? Mont State Dept of Health

APPEARING ON WHICH BILL? SB [redacted] 715

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: Oppose the Clinics

a) Our procedures are constitutional

b) Consent & spousal notice

c) State AGs opinion on the Act's

pending cases

d) Act conflicts w/ the purposes of the Dept of Health

e) Criminal Conviction of owners for criminal

[illegible] Sec. 1(1)

f) Operating requirements & ASC's other than that

would not apply to clinics & would violate Sec. 1(1)

g) Legislature cannot amend laws in the title Sec. 2(1)

h) Lack of Appropriation

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Chairman, House judiciary committee:

My name is (Mrs.) Sally Lind, I live in Missoula at 4305 Lake Place and represent the Missoula chapter, Montana Right to Life Association.

As an organized group of citizens and individually, we urge you, our elected represenatives, to pass the abortion control bill, Senate Bill 715, sponsored by Senator McNamer.

We feel this legislation is in keeping with traditional Montana law that respects human life and is also within the limits set forth by current Supreme Court rulings.

Please include this statement in your permanent hearing records.

NAME: (SISTER) MARY KAYE NEALEN DATE: 2/26/74

ADDRESS: SACRED HEART ACADEMY

REPRESENTING WHOM? MONTANA RIGHT TO LIFE, MISSOULA DELEGATION

APPEARING ON WHICH BILL? S.B. 215 (MC'NAMER)

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: I favor the strongest restrictions on abortion in Montana possible under the Supreme Court ruling. However I feel opponents a stronger position than mine.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

The Big Sky Country

MONTANA STATE SENATE

SENATOR WILLIAM R. McNAMER
HELENA ADDRESS:
STATE CAPITOL
HELENA, MONTANA 59601
BILLINGS ADDRESS:
MIDLAND BANK BUILDING
BILLINGS, MONTANA 59101
COMMITTEES:
LABOR AND EMPLOYMENT RELATIONS
FISH AND GAME
RULES AND JOURNAL

February 25, 1974

Representative Dan Yardley
Chairman House Judiciary Committee
House of Representatives
State Capitol Building

Re: Abortion and Conscience bills

Dear Representative Yardley:

For your convenience I thought I would put in writing some observations regarding the handling of the above.

You will recall that Senator Moore expressed preference for the abortion bill which I am sponsoring over his own, and practically recommended that his be killed.

I have before you, two conscience bills, 716 and 717. SB 716 relates to abortion, and I would suggest it be kept alive, but in Committee, to see if my abortion bill passes the House. If it does, SB 716 can be killed, because SB 715 contains identical provisions. But if no abortion bill passes the House, either my 716 or the conscience bill of Senator Cochrane which relates to abortion, should be passed, to at least take care of that question of conscience.

I am loathe to suggest which set of conscience bills, mine or Senator Cochrane's, you should find preferable. I will mention, as I did at the hearing, that my bills were drafted in consultation with the Council for the Hospital Association, and contained provisions of severability, basing the refusal on religious or moral grounds, and providing for written statements of the refusal. We thought these provisions important in a conscience bill.

My SB 717 is the conscience bill relating to sterilization, and either my bill or that of Senator Cochrane relating to sterilization, should be passed regardless of what happens to the abortion legislation, since this is an independent subject.

I have no objection to the amendments to the conscience language suggested by Chadwick Smith. If the Committee has any problems with any of these bills, or wants to amend them, I would be happy to be available for any questions.

This letter does not presume to tell you what to do with these bills, but merely to tell you how they relate to each other.

Very truly yours,

William R. McNamer

WILLIAM R. McNAMER, Senator
District #8

WRM:la

NAME: John C. Wilson DATE: 2-26-74

ADDRESS: Helena, Montana

REPRESENTING WHOM? State Dept of Health & Env Sciences

APPEARING ON WHICH BILL? S.B. 715

DO YOU: SUPPORT? _____ AMEND? ✓ OPPOSE? _____

COMMENTS: Support that paragraph (6) in section 7 which requires reporting violations to the Attorney General be deleted. This would diminish the completeness of reporting. Also request that a fiscal note be attached showing the estimated costs of operating such a reporting system would be $2,500 to $5,000 for the first year of operation.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Representative Roberts moved to amend by deleting Section 3 in its entirety. Following discussion Representative Roberts made a substitute motion to amend on page 3, line 3 after the material "legislation." by striking the material beginning with "should such" and continuing through line 8. Motion to amend carried unanimously.

Committee then elected to not make final decision on this bill but to defer until March 4, 1974.

SENATE BILL 715 Representative Bell moved to amend on page 16, line 14 by striking the words "or fetus", on line 14 and 15 by striking the words "or aborted" and on line 15 by striking the words "or fetus" for the purpose of getting away from contradiction in terms in this section. Representative Greely stated Senator McNamer felt he had to put in all these terms and he can't see why he has to amend this, just eliminate whole section of definitions. Would eliminate all of section 13 as all these definitions are already in the law. Discussion followed regarding terms "born alive" and "human being". A substitute motion was made by Representative Greely to delete section 13 beginning on page 12 in its entirety. The purpose in doing this is to help the bill in two ways: 1) it will make the bill shorter and easier to understand; 2) Also narrows definition of human being which goes back to the criminal code. Motion to amend carried unanimously.

Representative McKittrick stated he has reservations on written consent of the father. Supreme Court states punitive father rights not concerned. Representative McKittrick moved to amend on page 3, line 11 by striking the material "written consent of" and insert "written notice too", also amend on page 3, line 14 by inserting the material "the written consent of". Representative Towe suggested a better way to do this by inserting on page 3, line 2 the words "the written notice to her husband" and deleting "written consent" on line 14. Representative McKittrick explained this is Senator McNamer's amendment and he is not sure if this is constitutional or not. Following additional discussion regarding these amendments decision was made to vote on them separately.

Motion to amend on page 3, line 12 after the material "(a)" by inserting the new material "written notice to" carried. Motion to amend on page 3, subsection (b), line 14 after the material "(b)" by inserting "written consent of" failed with Representatives Bell and McKittrick voting aye.

Representative Roberts moved to amend on page 3, subsection (b), line 14 after the material "(b)" by inserting the new material "the written notice to". Motion carried with Representative Marbut voting no.

The meeting adjourned at 10:35 AM

Dan Yardley
DAN YARDLEY, VICE-CHAIRMAN

DY:pb

JUDICIARY COMMITTEE

March 4, 1974

EXECUTIVE SESSION

The forty second meeting of the House Judiciary Committee was called to order in Committee Room 436 of the Capitol Building at Helena, Montana on Monday, March 4, 1974 at 9:00 AM. Representative Dan Yardley, Vice-Chairman, presided. All members were present except Representative Hall, absent, excused.

No hearing was scheduled, meeting was called for purpose of Executive Session.

Acting Chairman Yardley stated the committee would take up where it had left off in previous meeting on the two abortion bills, Senate Bills Nos. 646 and 715 and explained amendments made to bills (see minutes for March 2, 1974 meeting).

SENATE BILL 715 Acting Chairman Yardley explained that this bill was still open for amending. Representative McKittrick stated he had more amendments to make to this bill and moved to amend on page 4, line 13 by striking the words "or fetus aborted" and insert after the word "infant" the word "born", then on page 5, line 4 strike "fetus aborted" and insert "born", on page 4, line 15 strike "or fetus is aborted" and insert "which is the subject of abortion if is born", on page 4, line 23 strike "or fetus", on page 4, line 25 strike "or fetus aborted", on page 12, line 1, strike "or fetus", on page 12, line 3 strike "or fetus aborted" and insert "is born", page 4, line 13 by striking "or fetus" and inserting "born", page 4, line 25, by striking "or fetus aborted" and insert "born". Representative Roberts thought these are amendments which clarify bill and made a motion they be deemed included in the bill. Representative Yardley stated that if there was no objection they will be included. Motion carried.

Representative McKittrick moved to amend on page 10, line 8 by striking "any person who knowingly", strike the "s" on the words "interferes" and "attempts", then put a period after "section" and strike the remainder of sentence, and insert in lieu thereof on page 10, line 8 the new material "It shall be unlawful to" and then sentence goes on starting with "interfere". Motion to amend carried. Representative McKittrick stated that was the end of amendments he intended to propose.

Representative Marbut moved to amend on page 8, line 12 by deleting all of subsection (6) in its entirety. Stated he moved this because the Department of Health testified they had neither interest, willingness or capability to act on this intent and feels attorney general should have this job. Representative McKittrick questioned whether the intent was that there would be

no policing of this to which he was told there wouldn't be in this bill. Representative Yardley questioned whether normally the county attorney would be the one to enforce the regulation. Representative Lucas feels this should be left in. Representative Baucus stated this seems discriminatory in this bill, doesn't think it is proper.

Representative McKittrick thinks should take a look at the basic philosophy, need to insure this policy has been effectuated. Questioned if it would be better to have attorney general since he is in Helena or disperse it among county attorneys. Representative Greely stated that the attorney general could look with disfavor on having to look through all records of Department of Health rather than the Department of Health reporting to the attorney general's office. Attorney general's office would then have to go and review the Department of Health's files at least yearly.

A substitute motion by Representative Lucas to strike everything in subsection (6) after the word "act" on page 8, line 13 carried.

Representative Roberts moved to amend page 8, subsection (7), line 16 by deleting all of subsection (7) and stated he feels this is a very broad statement and would inhibit information rather than encouraging it. Representative Towe stated that apparently violation refers to failure of physician to report and if department doesn't keep a file it is a misdemeanor. This seems inappropriate. Representative McKittrick wants subsection (7) in since there is a purpose for reporting, for department to properly perform its function as well as overlooking the health and well being of mothers. Stated since it is a misdemeanor it indicates the physician is responsible. Representative Bell reminded committee he thought perhaps the legislature was still embarrassed over passing the motorcycle helmet bill with no enforcement last year. Representative Lucas stated he had misgivings but doesn't want subsection (7) stripped. Representative Towe questioned whether it wasn't true the Department of Health has ability to promulgate regulations. Questioned what is between misdemeanor and nothing. Representative McKittrick thinks misdemeanor applies to violating a section of the law. Finds it more palatable than some other regulations, especially those placed on coal tax bill. Senator McNamer suggested, with permission of the chair, the committee put in "knowing violation". Representative Towe suggested amending by inserting after the material "(7)" the new language "Knowing failure to report" and stated he feels the word "knowing" does something. Representative McKittrick questioned whether "knowing" does anything to the bill.

Representative Lucas made a substitute motion to amend page 8, subsection (7) by inserting the language "failure to report as provided in this section is a misdemeanor". Motion carried with Representatives Towe, Marbut and Roberts voting no.

Representative Marbut stated he supports Representative Roberts original motion. Objects to Representative Lucas' amendment because on line 1, page 7 there is a reference to prior pregnancies and this raises question of prior pregnancies and right of privacy and cannot see how this would apply. Representative Lucas stated there has to be some sort of penalty for failure to report. Representative Warfield questioned what the purpose of reporting is and how does this fit in with bill passed in the house to which he was answered that bill in the house was an innocuous bill by Representative McKittrick. Senator McNamer with permission of the chair stated that purpose of report is we are dealing with an area of confidentiality of medical reports and still protecting human life. Need some way to determine whether abortion was performed at stage of viability. Need to make physician and hospital aware there is a law and it also helps to keep people honest. Also pointed out that there is much mystery surrounding abortion and maternal health, need to know what effect abortion has on later pregnancies and other medical factors. Need statistics to know if we are going to be protecting maternal health, will get a profile of type of women and situation where abortion is being requested. Representative Towe pointed out the only place where name of patient is dropped is where Department of Health reports statistical data. Senator McNamer suggested looking at subsection (4), read it and stated it means would not identify the mother or the physician, means there is a problem when abortion done in physicians office during first three months. Subsection (5) provides for procedure done in physicians office. The name goes no further than the institutions record or the physicians record. If complaint made to county attorney there has to be some record with a name in order to take it to court. Representative Roberts stated there was a self incrimination problem here. Substitute motion to amend subsection (7) on page 8 failed. Motion to amend by deleting subsection (7) in its entirety carried with Representatives McKittrick, Lucas, Bell, Brown and Baeth voting no.

Representative Greely moved to amend on page 8, section 8, line 22 by deleting the material "such hospital or facility" and inserting in lieu thereof the new language "its staff or governing board", amend on page 9, lines 9 and 10 by deleting "such hospital or facility" and insert "its staff or governing board".

A substitute motion by Representative Roberts to delete on page 8, section 8, subsection (1) in its entirety caused much discussion as to what a public hospital is as well as what a private hospital is. Representative Roberts stated a public hospital cannot have a stated moral or religious belief. Representative Greely withdrew his amendment to subsection (1) and Representative Roberts motion to delete subsection (1) in its entirety carried.

Representative Greely's motion to amend on page 9, lines 9 and 10 by striking "hospital or facility" and inserting "its staff or governing board" carried. Representative Greely pointed out

that on page 11, section 11 refers to 94-5-611 which is current law struck down as unconstitutional.

A motion to amend by Representative Lucas on page 11, subsection 11 by striking all of subsection (11) except the sentence "it is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation." carried.

Representative Towe stated that section 10-501 is repealed by the youth act. Moved that we leave this out. Representative Towe moved to delete section 12 beginning on page 11 in its entirety. Stated he doesn't think it does anything, also would conform with delinquent youth act. Motion carried. Senator McNamer pointed out that this dependent neglected youth portion is covered in another portion of the bill.

Representative Roberts moved to delete on page 2, section 3, subsection (3) in its entirety, it deals with informed consent. Pointed out section 4 on page 3 and read it, then subsection (5) on page 4 makes violation a felony. Feels matter of making a professional relationship subject to a felony is far too stringent. Representative McKittrick stated he would oppose this. Informed consent is nothing more than what is now required. Representative Towe called the committee's attention to lines 19 thru 25 on page 2, then lines 8 and 9 in section 4. Representative McKittrick stated the right to contract is one of the most fundamental and sacred rights. Following discussion Senator McNamer suggested reducing felony to a misdemeanor in subsection 1. The thrust of the language is that no administrative branch would have power to order or coerce an abortion.

A substitute motion by Representative Lucas to amend on page 3, line 20 by striking the words "court, judge", then also amend on page 4, subsection (5) by changing line 1 to read "violations of subsection (1), (2) or (4)" and then in line 2 strike the word "felony" and insert "misdemeanor" so that felony is out of it entirely carried.

Representative Roberts made a substitute motion to delete all of subsection (3) on page 2, line 6 through page 3, line 1.

Representative Marbut made a substitute motion to amend on page 2, subsection (3), line 9 by deleting the words "of the following" and then deleting subsections (a), (b) and (c) in their entirety. Following discussion by committee Representative Marbut questioned if they weren't trying to legislate medicine. Representative Marbut's motion failed.

A substitute motion by Representative Greely to strike line 19 of subsection (3), in other words, page 2, line 19 through page 3, line 1 was made. Representative Lucas stated with this

amendment seems we are trying to make abortion wide open. Representative Greely stated he proposed this because of problem of first three months pregnancy if this section left in, section 4 related back to that, if form not signed doctor subject to misdemeanor. Senator McNamer stated he thought there was some confusion on concept of "right of privacy", feels supreme court decision is woman has right to make decision of her own body within the first three months but then more restrictive measures placed on her. Representative Towe stated he agreed with Senator McNamer's interpretation of right of privacy but disagreed on misdemeanor application. Representative Greely's substitute motion to strike on page 2, line 19 through line 1 on page 3 failed.

A substitute motion by Representative Towe to amend on page 2, line 19 by striking the word "shall" and inserting in lieu thereof the word "may", which he feels is the same as what Senator McNamer is trying to accomplish, carried with Representative Lucas, Bell, McKittrick and Baeth voting no.

Committee then reverted back to original motion by Representative Roberts to delete subsection (3) on page 2 in its entirety. Representative Roberts stated had changed section on penalties from felony to misdemeanor, this softens but doesn't set out what has to go on between physician and patient, doesn't think we have any place in doing this. Cannot see why we have to set this out and made it a criminal penalty. Following brief discussion the motion failed with Representative Towe and Roberts voting yes.

Representative Greely suggested committee should amend title and key line to conform to amendments made. Representative Greely moved to strike the key line and conform the title by striking on page 1, line 10 all the material after the word "date". This motion deemed adopted by committee.

Representative Marbut moved Senate Bill 646 BE CONCURRED IN AS AMENDED. Motion failed in a tie vote with Representatives Yardley, Greely, Marbut, Roberts, Towe and Warfield voting yes.

Motion Senate Bill No. 715 BE CONCURRED IN AS AMENDED carried in a seven to four vote with Representative Yardley abstaining, Representatives Greely, Marbut, Roberts and Towe voting no.

Representative Roberts requested that if possible the bill be printed as amended for the second reading rather than just having the green sheet of amendments printed.

Representative Yardley stated he would hold up on the committee

report pending the opinion of Attorney General Woodahl which should be in later today. Committee had no objection.

The meeting adjourned at 10:35 AM.

DY:pb

DAN YARDLEY, VICE-CHAIRMAN

Representative Towe stated his own reaction to age was that if discrimination were allowed it would be difficult for older people to get a job and the same applies to the apprenticeship program.

Representative Marbut moved the adoption of his amendments (see exhibit). These provide for deletion of political belief and also includes physically and mentally handicapped in basis of discrimination. In answer to question by Representative McKittrick, Representative Marbut replied that this bill conforms with a bill pertaining to 64-302 which was passed out of the house. Representative Greely stated the amendments speak for themselves, they are good. He seconded motion to adopt amendments. Representative Lucas stated that most of his experience with discrimination against the physically handicapped was with accomodations and some employment situations. Motion to adopt proposed amendments carried with Representative Bell and Lucas voting no.

Representative Lucas moved Senate Bill 697 be amended by striking page 1, lines 21, 22 and 23 with capitalized words which say you can discriminate because of age. Motion carried.

Representative McKittrick moved to amend by adding a new section 9 to read "Nothing in this act shall preclude a person from filing a petition in district court even though relief has not first been sought from the commission." Stated he didn't want to circumvent the human rights commission but wanted to give the petitioner a choice. Under the APA some hearings are being held without a reporter and no record is kept. Representative Greely objected to the amendment and stated this is why we are setting up the commission is to get it out of court but leave them the right to go into court later. Representative Bell stated that if the commission isn't funded the court isn't going to say "go to the commission". Following additional discussion the motion to amend failed on a tie vote with Representatives Towe, Lucas, Warfield, McKittrick and Baeth voting yes, Representatives Baucus and Brown absent.

Representative McKittrick stated the commission as the bill is written is composed of five members appointed by the governor. Under 82A-112 it is required at least one member be a lawyer. Questioned what about putting in minority groups.

Representative Greely moved Senate Bill 697 BE CONCURRED IN AS AMENDED. Motion carried with Representatives Bell and Lucas voting no, Representatives Baucus and Brown absent.

SENATE BILL 715 This bill was acted upon to BE CONCURRED IN AS AMENDED in previous meeting of Judiciary Committee but Representative Yardley upon agreement of the committee held bill in committee pending requested opinion by Attorney General

Woodahl. (see exhibit). Representative Roberts stated he thinks the attorney general's letter is entirely wrong. The Doby Bolton decision was required during the first trimester and not consistent with other decision. Stated the letter has no place in committee's deliberations. Committee elected to report bill out as moved in previous meeting.

SENATE BILL 556 Representative Fasbender, according to Representative Yardley, has proposed amendments to this bill which replace the language where it applies to the supreme court with the language leadership and defines same. It is the duty of the legislature to bring recodification about. The process would not preclude legislature from going to the supreme court. Once commissioner established could go back to the supreme court.

Representative Greely moved the adoption of the amendments as proposed by Representative Fasbender (see exhibit). Representative Lucas stated he sees no reason for the legislature to be involved in recodification once this law is made and is opposed to having the leadership rather than the supreme court amended into bill. Feels the court has to maintain control. Representative Towe stated he feels it would be a serious mistake to separate the powers. Representative Greely stated the code commissioner should be with legislature both after, before and during the time laws are passed, is an arm to the legislature. If responsible to the supreme court won't have the same input. Feels very strongly about separation of powers. Code commissioner will be an independent man. Representative Bell stated there is a problem in that legislature and its leadership is only here two and a half months per year. With changes in leadership and legislature would expect change in code commissioner. Representative Lucas stated he feels legislative council has to be involved.

Motion BE CONCURRED IN AS AMENDED carried with Representatives Lucas, Bell and Warfield abstaining, Representative Baucus absent.

Time ran out and the meeting adjourned at 10:35 AM.

DY:pb

DAN YARDLEY, VICE-CHAIRMAN

State of Montana
Office of The Attorney General
Helena 59601

March 4, 1974

Mr. Dan Yardley, Vice Chairman
House Judiciary Committee
Montana House of Representatives
State Capitol
Helena, Montana 59601

Dear Mr. Yardley:

As Vice Chairman of the House Judiciary Committee you have requested my opinion on the constitutionality of Senate Bill 646 and Senate Bill 715 in light of the recent United States Supreme Court decisions of Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147 (1973), and Doe v. Bolton, U.S. , 35 L.Ed.2d 201 (1973), as well as Judge Russell Smith's ruling in Doe v. Woodahl, 360 F.Supp. 20 (D. Mont. 1973). The actual constitutionality of such proposed laws is, of course, strictly a judicial determination which can be made only by a court of competent jurisdiction. In light of the urgency of your request, however, I hereby tender my legal opinion as to the possible constitutionality or unconstitutionality of the two bills.

Senate Bill 646, sponsored by Senator James Moore, is an act which very briefly defines the crime of abortion and prescribes criminal penalties. After thoroughly reviewing and analyzing the act in light of the Wade and Bolton cases, supra, it is my opinion that it contains two questionable provisions. Section 2 (1)(b) refers to the second trimester of pregnancy as "between the end of the first trimester and the end of the second trimester or the viability of the fetus, whichever comes earlier". The United States Supreme Court in the Wade and Bolton cases, supra, referred to the second trimester of pregnancy merely as the period of time after the end of the first trimester until "viability". The terminology "end of the second trimester" in Senate Bill 646 is therefore in my opinion dangerously vague.

Section 3 reiterates the intent of the legislature to restrict abortion as far as possible under court decisions and legislation. To this extent section 3 is proper. It continues, however, by stating that sections 94-5-611 and 94-5-612, Revised Codes of Montana, 1947 (formerly sections 94-401 and 94-402, R.C.M. 1947), Montana's miscarriage and abortion statutes, are "retained in force" as modified and limited by court rulings and legislation.

The fact is that in the case of Doe v. Woodahl, supra, decided by Judge Russell Smith on May 2, 1973, sections 94-401 and 94-402, R.C.M. 1947, were held unconstitutional when applied to a woman during the first trimester of her pregnancy. Thereafter, on May 29, 1973, under the Wade guidelines the court held Montana's miscarriage/criminal abortion statutes unconstitutional as a unit.

It is my opinion, therefore, that section 3 of Senate Bill 646 should probably delete any reference to sections 94-5-611 and 94-5-612, R.C.M. 1947, because they are unconstitutional.

Senate Bill 715, sponsored by Senators McNamer, Turnage, Zody, and Keenan, entitled "The Montana Abortion Control Act", is an act regulating abortions, providing for keeping of records of abortions, declaring the right to refuse to participate in abortions, protecting the life of the fetus, providing for penalties and an effective date, and amending sections 10-501 and 94-2-101, R.C.M. 1947.

After thoroughly reviewing Senate Bill 715, I believe there are three provisions in the act which may raise possible constitutional issues.

First, section 4 (2)(a) and (b) of the act provides that no abortion "may be performed upon any woman in the absence of written consent" of the woman's husband, unless he is "voluntarily separated from her", or from a parent, custodian, or legal guardian of the woman if she is under eighteen (18) years of age and unmarried.

In neither the Wade nor the Bolton cases, supra, did the Supreme Court answer the questions concerning the constitutionality of statutes protecting the rights of husbands or of parents or legal guardians of the woman. Since the Court was not presented with those questions it did not decide those important constitutional issues. Such provisions for consent as set forth in section 4 (2) of the act would therefore be constitutional until such time as a court of competent jurisdiction ruled otherwise.

Secondly, section 6 (1)(c)(ii) provides that no abortion may be performed after viability of the fetus unless the abortion is medically determined by the woman's physician to be necessary to preserve her life or health and that such determination has been concurred in by two other licensed physicians.

In the Bolton case, supra, at 35 L.Ed.2d 216 and 217, the Supreme Court specifically held that a state criminal abortion statute's requirement that two licensed physicians concur in the judgment of the pregnant female's doctor that an abortion should be performed is unconstitutional because there is no rational connection with the patient's needs and it unduly infringes on the physician's right to practice.

It is therefore my opinion that section 6's requirement of concurrence by two other licensed physicians may be an unconstitutional provision in light of the Bolton case, supra.

Thirdly, Senate Bill 715 in section 11 states that sections 94-5-611 and 94-5-612, M.C.M. 1947, are "retained in force", as does Senate Bill 646, discussed supra. My remarks regarding that provision in Senate Bill 646 are just as applicable to section 11 of Senate Bill 715. Section 11 should probably delete any reference to those unconstitutional sections.

It is, therefore, my opinion that Senate Bill 646 and Senate Bill 715 are generally in compliance with the guidelines of recent federal court decisions with the exception of the provisions I have discussed herein.

Very truly yours,

ROBERT L. WOODALL
Attorney General

RLW:dm

copy to: Senator Jim Moore
Senator William R. McNamer
Senator Jean A. Turnage
Senator Artis A. Zody
Senator Patrick J. Keenan

(4) The department shall informally investigate the matters set out in a filed complaint promptly and impartially. If the department determines that the allegations are supported by substantial evidence, it shall immediately try to eliminate the discriminatory practice by conference, conciliation, and persuasion.

(5) If the informal efforts to eliminate the alleged discrimination are unsuccessful, the department shall inform the commission of the failure and the commission shall cause written notice to be served together with a copy of the complaint, requiring the person, employer, business, corporation or agency charged in the complaint to answer the allegations of the complaint at a hearing before the commission. The hearing shall be held by the commission in the county where the unlawful conduct is alleged to have occurred unless the person, employer, business, corporation, organization, agency or the commission requests a change of venue for good cause shown. The case in support of the complaint may be presented before the commission by the department, the complainant or by an attorney representing the complainant. The hearing and any subsequent proceedings under the act except as permitted under section 7, shall be held in accordance with the Montana Administrative Procedure Act.

Section 6. There is a new section to be numbered 64-309, R.C.M. 1947, which reads as follows:

64-309. **Power of commission on finding of discrimination.** (1) If the commission finds that a person against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, it shall order him to refrain from engaging in the discriminatory conduct. The order may prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found.

(a) The order may require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against.

(b) The order may require a report on the manner of compliance.

(c) The order may not require the payment of any punitive damages as defined by the Revised Codes of Montana.

(2) If the commission finds that a person against whom a complaint was filed has not engaged in the discriminatory practice alleged in the complaint, it shall issue and cause to be served on the complainant an order dismissing the complaint.

Section 7. There is a new section to be numbered 64-310, R.C.M. 1947, which reads as follows:

64-310. **Injunction to enforce commission order.** The department may petition the district court in the county where the discriminatory practice occurred or in which the respondent resides or transacts business to enforce the commission's order by injunction.

Section 8. There is a new section to be numbered 64-311, R.C.M. 1947, which reads as follows:

64-311. **Department may employ attorney.** (1) The department may employ an attorney as legal counsel. He shall advise the commission in legal matters arising in the discharge of its duties, shall assist in the preparation and presentation of complaints to the commission, and shall represent the commission in legal actions to which it is a party. The attorney general shall perform this function at the request of the commission.

Section 9. There is a new section to be numbered 64-312, R.C.M. 1947, which reads as follows:

64-312. **Unlawful to violate act — penalty.** (1) It is unlawful for a person to aid, abet, incite, compel or coerce the doing of an act forbidden under this act or to attempt to do so.

(2) No person or institution may discharge or discriminate against any participant or potential participant because he or she has made a complaint, assisted with an investigation or instituted proceedings.

(3) A person, employer, business, organization, corporation or agency, both public and private, who or which willfully engages in an unlawful discriminatory practice prohibited by this act or willfully resists, prevents, impedes, or interferes with the commission, the department or any of its authorized representatives in the performance of duty under this act or who or which willfully violates an order of the commission or violates this act in any other manner, is guilty of a misdemeanor and is punishable by a fine of not more than five hundred dollars ($500) or by imprisonment for not more than six (6) months or both.

Section 10. Sections 64-302 and 64-303, R.C.M. 1947, are repealed.

Approved March 25, 1974

CHAPTER NO. 284

AN ACT REGULATING ABORTIONS; PROVIDING FOR KEEPING OF RECORDS OF ABORTIONS; DECLARING THE RIGHT TO REFUSE TO PARTICIPATE IN ABORTIONS; PROTECTING THE LIFE OF THE FETUS; PROVIDING PENALTIES AND AN EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. There is a new section to be numbered 94-5-613, R.C.M. 1947, which reads as follows:

94-5-613. **Short title.** This act shall be known and may be cited as the "Montana Abortion Control Act."

Section 2. There is a new section to be numbered 94-5-614, R.C.M. 1947, which reads as follows:

94-5-614. **Statement of purpose.** The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn

or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.

Section 3. There is a new section to be numbered 94-5-615, R.C.M. 1947, which reads as follows:

94-5-615. **Definitions.** As used in this act:

(1) "Department" means the department of health and environmental sciences.

(2) "Facility" means a hospital, health care facility, physician's office or other place in which an abortion is performed.

(3) "Informed consent" means voluntary consent to abortion by the woman upon whom the abortion is to be performed only after full disclosure to her by the physician who is to perform the abortion of such of the following information as is reasonably chargeable to the knowledge of such physician in his professional capacity:

(a) The stage of development of the fetus, the method of abortion to be utilized, and the effects of such abortion method upon the fetus.

(b) The physical and psychological effects of abortion.

(c) Available alternatives to abortion, including childbirth and adoption.

Such informed consent may be evidenced by a written statement in the form prescribed by the department signed by the physician and the woman upon whom the abortion is to be performed in which the physician certifies that he has made the full disclosure provided above and in which the woman upon whom the abortion is to be performed acknowledges that the above disclosures have been made to her and that she voluntarily consents to the abortion.

(4) "Abortion" means the performance of, or assistance or participation in the performance of, or submission to, an act or operation intended to terminate a pregnancy without live birth.

(5) "Viability" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.

Section 4. There is a new section to be numbered 94-5-616, R.C.M. 1947, which reads as follows:

94-5-616. **Consent to abortion.** (1) No abortion may be performed upon any woman in the absence of informed consent.

(2) No abortion may be performed upon any woman in the absence of:

(a) the written notice to her husband, unless her husband is voluntarily separated from her;

(b) the written notice to a parent, if living, or the custodian or legal guardian of such woman, if she is under eighteen (18) years of age and unmarried.

(3) The above informed consent or consent is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(4) No executive officer, administrative agency or public employee of the state of Montana or of any local governmental body has power to issue any order requiring an abortion or shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.

(5) Violation of subsection (1), (2) or (4) of this section is a misdemeanor.

(6) The use of the prescribed departmental form of informed consent required by section 3 [94-5-615(3)] shall not be mandatory until July 1, 1974. Prior thereto, a written statement fairly setting forth the content specified by section 3 [94-5-615(3)] shall be in compliance therewith.

Section 5. There is a new section to be numbered 94-5-617, R.C.M. 1947, which reads as follows:

94-5-617. **Protection of life and health of infant.** (1) A person commits the offense of criminal homicide, as defined in sections 94-5-101 through 94-5-105, if he purposely, knowingly, or negligently causes the death of a premature infant born alive, if such infant is viable.

(2) Whenever a premature infant which is the subject of abortion if is born alive and is viable, it becomes a dependent and neglected child subject to the provisions of state law, unless:

(a) the termination of the pregnancy is necessary to preserve the life of the mother; or

(b) the mother and her spouse, or either of them, have agreed in writing in advance of the abortion, or within seventy-two (72) hours thereafter, to accept the parental rights and responsibilities of the premature infant if it survives the abortion procedure.

(3) No person may use any premature infant born alive for any type of scientific research, or other kind of experimentation except as necessary to protect or preserve the life and health of such premature infant born alive.

(4) The department shall make regulations to provide for the humane disposition of dead infants or fetuses.

(5) Violation of subsection (3) of this section is a felony.

Section 6. There is a new section to be numbered 94-5-618, R.C.M. 1947, which reads as follows:

94-5-618. **Control of practice of abortion.** (1) No abortion may be performed within the state of Montana:

(a) Except by a licensed physician.

(b) After the first three months of pregnancy, except in a hospital licensed by the department.

(c) After viability of the fetus, unless in appropriate medical judgment, the abortion is necessary to preserve the life or health of the mother. An abortion under this subsection (1) (c) may only be performed if:

(i) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by him, setting forth in detail the facts upon which he relies in making such judgment; and

(ii) two other licensed physicians have first examined the patient and concurred in writing with such judgment.

The foregoing certification and concurrence is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(2) The timing and procedure used in performing an abortion under subsection (1) (c) of this section must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in section 94-2-101 (32). The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health of the mother.

(3) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(4) Violation of subsections (1) and (2) of this section is a felony. Violation of subsection (3) of this section is a misdemeanor.

Section 7. There is a new section to be numbered 94-5-619, R.C.M. 1947, which reads as follows:

94-5-619. **Reporting of practice of abortion.** (1) Every facility in which an abortion is performed within the state of Montana shall keep on file upon a form prescribed by the department a statement dated and certified by the physician who performed the abortion setting forth such information with respect to the abortion as the department by regulation shall require; including, but not limited to, information on prior pregnancies; the medical procedure employed to administer the abortion; the gestational age of the fetus; the vital signs of the fetus after abortion, if any; and if after viability, the medical procedures employed to protect and preserve the life and health of the fetus.

(2) The physician performing an abortion shall cause such pathology studies to be made in connection therewith as the department shall require by regulation, and the facility shall keep the reports thereof on file.

(3) In connection with an abortion, the facility shall keep on file the original of each of the documents required by this act relating to informed consent, consent to abortion, certification of necessity of abortion to preserve the life or health of the mother, and certification of necessity of abortion to preserve the life of the mother.

(4) Such facility shall within thirty (30) days after the abortion file

with the department a report upon a form prescribed by the department and certified by the custodian of the records or physician in charge of such facility setting forth all of the information required in subsections (1), (2), and (3) of this section, except such information as would identify any individual involved with the abortion. The report shall exclude copies of any documents required to be filed by subsection (3) of this section, but shall certify that such documents were duly executed and are on file.

(5) All reports and documents required by this act shall be treated with the confidentiality afforded to medical records, subject to such disclosure as is permitted by law; except that statistical data not identifying any individual involved in an abortion shall be made public by the department annually, and the report required by subsection (4) of this section to be filed with the department shall be available for public inspection except insofar as it identifies any individual involved in an abortion. Names and identities of persons submitting to abortion shall remain confidential among medical and medical support personnel directly involved in the abortion, and among persons working in the facility where the abortion was performed whose duties include billing the patient or submitting claims to an insurance company, keeping facility records, or processing abortion data required by state law.

(6) The department shall report to the attorney general any apparent violation of this act.

(7) The reports required by this section shall not be mandatory for any abortion performed prior to July 1, 1974.

Section 8. There is a new section to be numbered 94-5-620, R.C.M. 1947, which reads as follows:

94-5-620. **Refusal to participate in abortion.** (1) No private hospital or health care facility shall be required contrary to the religious or moral tenets or the stated religious beliefs or moral convictions of its staff or governing board to admit any person for the purpose of abortion or to permit the use of its facilities for such purpose. Such refusal shall not give rise to liability of such hospital or health care facility, or any personnel or agent or governing board thereof, to any person for damages allegedly arising from such refusal, nor be the basis for any discriminatory, disciplinary, or other recriminatory action against such hospital or health care facility, or any personnel, agent, or governing board thereof.

(2) All persons shall have the right to refuse to advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions. If requested by any hospital or health care facility, or person desiring an abortion, such refusal shall be in writing signed by the person refusing, but may refer generally to the grounds of "religious beliefs and moral convictions." The refusal of any person to advise concerning, perform, assist, or participate in abortion, shall not be a consideration in respect of staff privileges of any hospital or health care facility, nor a basis for any discriminatory, disciplinary, or other recriminatory action against such person, nor shall such person be liable to any person for damages allegedly arising from refusal.

(3) It shall be unlawful to interfere or attempt to interfere with the right of refusal authorized by this section. The person injured thereby shall be entitled to injunctive relief, when appropriate, and shall further be entitled to monetary damages for injuries suffered.

(4) Such refusal by any hospital or health care facility or person shall not be grounds for loss of any privileges or immunities to which the granting of consent may otherwise be a condition precedent, or for the loss of any public benefits.

(5) As used in this section, the term "person" includes one or more individuals, partnerships, associations, and corporations.

Section 9. There is a new section to be numbered 94-5-621, R.C.M. 1947, which reads as follows:

94-5-621. **Other regulations.** The department shall make regulations for a comprehensive system of reporting of maternal deaths and complications within the state of Montana resulting directly or indirectly from abortion, subject to the provisions of section 7 [94-5-619(5)] of this act.

Section 10. There is a new section to be numbered 94-5-622, R.C.M. 1947, which reads as follows:

94-5-622. **Penalties.** (1) A person convicted of criminal homicide under this act is subject to the penalties prescribed by sections 94-5-101 through 94-5-105.

(2) A person convicted of a felony other than criminal homicide under this act is subject to a fine not to exceed one thousand dollars ($1,000), or imprisonment in the state prison for a term not to exceed five (5) years, or both.

(3) A person convicted of a misdemeanor under this act is subject to a fine not to exceed five hundred dollars ($500), or imprisonment in the county jail for a term not to exceed six (6) months, or both.

Section 11. There is a new section to be numbered 94-5-623, R.C.M. 1947, which reads as follows:

94-5-623. **Legislative intent.** It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.

Section 12. There is a new section to be numbered 94-5-624, R.C.M. 1947, which reads as follows:

94-5-624. **Severability.** It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all the valid applications that are severable from the invalid applications.

Section 13. This act is effective on its passage and approval.

Approved March 25, 1974

CHAPTER NO. 285

AN ACT AMENDING SECTION 4-332, R.C.M. 1947, TO PROVIDE FOR

SPECIAL PERMITS TO SELL BEER FOR ANY PICNIC, CONVENTION, FAIR, CIVIC OR COMMUNITY ENTERPRISE; AND PROVIDING FOR AN EFFECTIVE DATE.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 4-332, R.C.M. 1947, is amended to read as follows:

"4-332. **Special permits to sell beer — application and issuance — fee.** (1) Any association or corporation *conducting a picnic, convention, fair, civic or community enterprise, or sporting event,* shall in the discretion of the *liquor division* be entitled to a special permit to sell beer to the patrons of such *event* to be consumed within the enclosure *wherein the event is held.*

The application of any such association or corporation shall describe the location of such enclosure wherein such *event* is held, the nature of such *event,* the period when it is contemplated that the same will be held. Such application shall be accompanied by the amount of the permit fee hereinafter provided.

The permit issued to such association or corporation shall be a special permit, but shall not authorize the sale of beer except starting one (1) day in advance of the regular period when *events* are being held upon such grounds and during the period described in such application, and for one (1) day thereafter.

The permit fee shall be at the rate of *fifteen dollars ($15)* per day for each day beer is sold, or *to be sold at those events lasting two (2) or more days,* but in no event less than *thirty dollars ($30),* hereby fixed as the minimum fee for such permit.

(2) Any post of a nationally chartered veterans' organization or any lodge of a recognized national fraternal organization, not otherwise licensed under this act, shall in the discretion of the board, without notice or hearing as provided in section 4-407.1, be entitled to a special permit to sell beer at such post or lodge, to members and their guests only, to be consumed within the hall or building of such post or lodge.

The application of such nationally chartered veterans' organization or lodge of a recognized national fraternal organization shall describe the location of the hall or building where the special permit shall be used and the date it will be used. Such application shall be accompanied by a permit fee of *ten* dollars *($10).*

The special permit issued shall be for a twenty-four (24) hour period ending at 2 a.m. only and the board shall not issue more than twelve (12) such permits to any such post or lodge during a calendar year."

Section 2. **Effective date.** This act is effective on its passage and approval.

Approved March 25, 1974

CHAPTER NO. 286

AN ACT TO REQUIRE TAXING AUTHORITIES TO HOLD HEARINGS